

Exhibit AA

Page 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CIVIL ACTION NO. 2:11-cv-01754-JLL-JAD

KIMBERLEE WILLIAMS, et al.,
Plaintiffs,

vs.

BASF CATALYSTS, LLC, et al.,
Defendants.

Friday, February 23, 2018

Stenographic Transcript of Special
Master Conference, taken at the law offices of
Ballard Spahr, 1735 Market Street, 48th Floor,
Philadelphia, PA, before Robert J. Boccolini,
Certified Court Reporter, on the above date,
commencing at 10:05 a.m., there being present:

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Page 4

1 **SPECIAL MASTER:** Good morning, everyone.

2 Let me welcome you all to the home of the Superbowl
3 champion Philadelphia Eagles. If anybody has
4 something bad to say about them, don't.

5 Let's get the appearances of counsel on
6 the record, starting with the plaintiffs.

7 **MR. PASTERNAK:** Eric Pasternack, Cohen,
8 Placitella & Roth.

9 **SPECIAL MASTER:** You're going to have to
10 speak up. The room is a little --

11 **MR. PASTERNAK:** Eric Pasternack, Cohen,
12 Placitella & Roth.

13 **MR. PLACITELLA:** Chris Placitella.

14 **MR. JARED PLACITELLA:** Jared Placitella
15 for plaintiffs.

16 **MR. COREN:** Michael Coren for
17 plaintiffs.

18 **MR. ROTH:** Harry Roth.

19 **MR. PRATTER:** Robert Pratter,
20 P-R-A-T-T-E-R, for plaintiffs.

21 **MR. ASSAF:** Gene Assaf for the
22 defendant, BASF.

23 **MR. BRESS:** Dan Bress for BASF.

24 **MR. FARRELL:** Peter Farrell for BASF.

25 **MS. DALMET:** Elizabeth Dalmet for BASF.

1 **MR. ANGUAS:** Ronald Anguas for BASF.

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4 **MR. MONTALTO:** Vince Montalto, BASF.

5 **MR. HICKOK:** Robert Hickok for Cahill.

6 **MS. GUSSACK:** Nina Gussack for the
7 Cahill defendants.

8 **MR. BOISE:** Barry Boise for the Cahill
9 defendants.

10 **MR. ROSENTHAL:** Thorn Rosenthal from
11 Cahill.

12 **SPECIAL MASTER:** Okay. And also
13 present is Will Reiley from our firm, as you already
14 know is the one who keeps me organized. That is
15 whenever Mr. Assaf allows him to do that, which
16 segues into Mr. Assaf's letter of February 22nd --

17 **MR. TUNIS:** I'm sorry, your Honor, there
18 are also counsel on the phone. Eric Tunis on behalf
19 of Tom Halket.

20 **MR. BOYLE:** John Boyle from Marino,
21 Tortorella & Boyle, on behalf of Arthur Dornbusch.

22 **SPECIAL MASTER:** Anyone else?

23 **MR. QUINN:** Jeffrey Quinn for BASF.
24 Good morning, your Honor.

25 **SPECIAL MASTER:** Good morning. My

Page 6

1 apologies. I did not mean to forget you, but I did.

2 In any event, I assume everyone has seen
3 Mr. Assaf's letter of yesterday where he lists the
4 items that he thinks should be discussed, which are
5 the four motions that are actually before me, and
6 then he has a list of six other items that he thinks
7 we should discuss.

8 I'm happy to do this in whatever order
9 you want. But I had proposed doing the motions,
10 leaving the crime fraud slash Kozlov motion for last
11 and at that point address the items that are in Mr.
12 Assaf's letter of yesterday, if that's okay with
13 everybody, the idea being that by the end of doing
14 all the motions, everybody's going to be so tired
15 they'll be more agreeable about the last items in the
16 letter. So if that's okay with everyone, why don't
17 we do that.

18 Let us start with an easy one, which is
19 plaintiffs' motion for leave to supplement the
20 record.

21 On February 20th, 2018, under ECF number
22 443, plaintiffs filed a motion for leave to
23 supplement the record to add the April 16, 1983,
24 deposition transcript of Peter N. Gale, G-A-L-E.
25 They claim that the Gale deposition presents, one,

Page 7

1 that Mr. Gale was the third Engelhard scientist
2 saying that Engelhard and Cahill knew of evidence
3 that the Emtal talc contained asbestos fibers;
4 second, that it shows that the evidence existed when
5 the Ashton affidavit attested that Johnson mine ore
6 did not contain asbestos; third, it proves that BASF
7 and Cahill sought to erase all record of Gale's
8 testimony; fourth, proves BASF and Cahill attempted
9 to destroy or suppress evidence; and five, it proved
10 that BASF and Cahill have not produced the documents
11 identified in the Gale deposition.

12 On February 21, 2018, under ECF number
13 445, BASF filed its opposition. They first suggest
14 that the motion to supplement the record is improper,
15 that plaintiffs have had the Gale transcript for a
16 long period of time, and also adds on for good
17 measure that the reply brief that plaintiffs filed
18 should be suppressed.

19 Mr. Placitella, who is going to speak to
20 this?

21 **MR. PLACITELLA:** I will, your Honor.

22 **SPECIAL MASTER:** Thank you.

23 **MR. PLACITELLA:** In our original brief
24 to the Court that was filed in November and then in
25 our supplemental brief we had indicated that it was

Page 8

1 our understanding that the Gale deposition did not
2 exist. And after filing our supplemental brief, we
3 discovered in the production of Johnson & Johnson,
4 which was made I think on November 17th, which is
5 after our initial brief was filed --

6 **SPECIAL MASTER:** But before your reply
7 brief was filed.

8 **MR. PLACITELLA:** But before the reply
9 brief was filed, that the deposition was there.

10 **SPECIAL MASTER:** Well, answer me this
11 then. If you didn't have the Gale deposition in
12 hand until 15 days after you filed your initial
13 moving brief on the crime fraud exception, how do you
14 account for the two separate references to the Gale
15 deposition that appear in your brief?

16 **MR. PLACITELLA:** Well, we believe that
17 it was taken. We just didn't have the brief itself
18 and --

19 **SPECIAL MASTER:** I'm sorry, you didn't
20 have the transcript.

21 **MR. PLACITELLA:** The transcript itself.

22 **SPECIAL MASTER:** Well then how do you
23 make a representation as to what the transcript stood
24 for, which you did twice again on pages 11 and 16 of
25 your initial brief?

Page 9

1 **MR. PLACITELLA:** Well, he was deposed on
2 two separate occasions inside the Westfall case.
3 Once he was deposed because he was listed as an
4 expert and there was a squabble between the
5 plaintiffs' lawyers and Engelhard, so he was deposed
6 then. And then he was deposed a second time.

7 We knew -- or we believed he was deposed
8 based upon documents where he was copied on things.

9 And if you look in the transcripts of
10 Hemstock and Triglia, they talk about information
11 that Mr. Gale had in his files. But we believed
12 that deposition no longer existed.

13 In fact, when I took Mr. Steinmetz's
14 deposition in August, he in fact indicated that BASF
15 did not have a copy of the transcript. He questioned
16 whether the transcript was ever --

17 **SPECIAL MASTER:** Ordered.

18 **MR. PLACITELLA:** -- whether the
19 deposition was ever even taken based upon the
20 information he had. He actually said that.

21 So frankly, we've been running pretty
22 hard on this case trying to keep the schedule that
23 the Court has allotted to us and that we've imposed
24 on ourselves.

25 There's hundreds of thousands of pages

Page 10

1 of production that were made on an ongoing basis. In
2 the perfect world, we would have seen it on November
3 17th. But it's not a perfect world. And we
4 discovered it recently.

5 And frankly, we thought we had a duty of
6 candor to the Court to tell you that we were wrong,
7 because we were wrong. And we had made the
8 allegation that the deposition no longer existed,
9 when in fact it did exist.

10 It didn't exist in the files of BASF.
11 It didn't exist in the files of Cahill. But it did
12 exist in the files of Johnson & Johnson.

13 It's significant because in 1979, in the
14 early part of the 1979, after getting a lot of
15 information and lot of testing results, Engelhard
16 decided to do a thorough assessment of its own mine.
17 Mr. Gale traveled to the mine, along with Dr.
18 Hemstock. Dr. Hemstock says that it was at his
19 insistence that they did that. They wanted to
20 characterize what was in the mine.

21 And what happened then was they went up
22 and they took rock samples from two levels of the
23 mine that they were currently exploring. There were
24 multiple levels of the mine.

25 They then brought those rock samples

Page 11

1 back. Mr. Gale then went to Georgia Tech, actually
2 used their equipment because it was very
3 sophisticated, and he made notes, he drew
4 conclusions, he determined that there was in fact
5 asbestos in the mine.

6 That's significant for a number of
7 reasons, which we'll spend some more time on in crime
8 fraud.

9 But there were representations made by
10 Engelhard through Mr. Ashton and others that there
11 was no evidence of asbestos in the mine. Yet we had
12 Mr. Gale, the geologist and the head scientist,
13 finding asbestos in the mine.

14 It's significant because -- and we'll
15 talk about it a little more later -- in Ashton's
16 affidavit he cites to a deposition transcript from
17 the Westfall case. That is the deposition
18 transcript of their expert, Chidester.

19 So clearly Engelhard and Ashton were
20 referring to stuff that went on inside the Westfall
21 proceedings. They cited to Chidester's deposition
22 and completely ignored or did not include depositions
23 of their own scientists that came to opposite
24 conclusions.

25 **SPECIAL MASTER:** So to -- I don't mean

1 to short-circuit you, but I'm going to.

2 **MR. PLACITELLA:** Please.

3 **SPECIAL MASTER:** Your argument basically
4 is the information is relevant and material.

5 **MR. PLACITELLA:** Yes.

6 **SPECIAL MASTER:** There are, if not
7 necessarily exceptional circumstances, at least
8 sufficient circumstances to justify the delay in
9 presenting it as part of the application.

10 **MR. PLACITELLA:** Yes.

11 **SPECIAL MASTER:** And that it should be
12 considered and given whatever weight is appropriate
13 to it.

14 **MR. PLACITELLA:** That's absolutely
15 correct. And Jared reminds me that we actually
16 didn't locate it until after we filed the reply
17 brief. Whether we should have seen it sooner, that's
18 on us.

19 Now, I do want to address a couple of
20 things as relates to this. BASF in their
21 reply indicated that --

22 **SPECIAL MASTER:** You mean their
23 opposition.

24 **MR. PLACITELLA:** Their opposition
25 indicated that, well, it kind of proves that the --

1 it goes against the plaintiffs' statements that
2 spoliation and destruction of documents happened.

3 But actually, if you look at the
4 transcript itself, it actually proves the point.

5 **SPECIAL MASTER:** You're now going to the
6 weight of the evidence.

7 **MR. PLACITELLA:** I'm happy to stop
8 there. I was just responding --

9 **SPECIAL MASTER:** I'm happy for you to
10 stop there.

11 **MR. PLACITELLA:** Okay. And I won't
12 respond to that unless Mr. Assaf addresses it.

13 **MR. FARRELL:** Thank you, your Honor.
14 Peter Farrell for BASF.

15 **SPECIAL MASTER:** Good morning, Mr.
16 Farrell.

17 **MR. FARRELL:** Good morning. So a
18 couple of points in response. We obviously have no
19 objection to the plaintiffs correcting the mistake in
20 their brief. And we appreciate the fact that they
21 brought their mistake to the Court's attention.

22 Our concern is with the effort to
23 supplement reply materials which were themselves
24 improper.

25 **SPECIAL MASTER:** Well, we're going to

1 get to that later.

2 **MR. FARRELL:** I understand that. But
3 that was the real heart of our objection is that the
4 reply itself was improper. And so an effort to
5 supplement something that was improper is now into
6 two layers of improper additions to the record in our
7 view.

8 **SPECIAL MASTER:** But isn't it fair to
9 say, Mr. Farrell, that if they had had this
10 information before they filed their crime fraud
11 motion on November the 2nd of 2017, they would have
12 included it? Certainly given the amount of paper I
13 have in front of me, no one felt shy about adding
14 exhibits to this record.

15 **MR. FARRELL:** It's not a function of
16 adding exhibits to the record. Plaintiffs used
17 exhibits in their opening brief. Maybe they would
18 have used it if they had known about it at the time.

19 And BASF properly used exhibits in its
20 opposition brief.

21 **SPECIAL MASTER:** But I think you're
22 conflating -- and maybe you need to. But I think
23 you're conflating two different issues. One is the
24 propriety of a motion for leave to supplement the
25 record as opposed to your objection to the reply

1 brief in and of itself in whatever format, whether
2 supplemented or unsupplemented.

3 **MR. FARRELL:** I think that raises your
4 Honor's point earlier about whether there's an
5 explanation or excuse here that justifies the late
6 notice of this transcript.

7 And on that score, I would note that the
8 production from Johnson & Johnson still has not been
9 produced to BASF by the plaintiffs. If it had been
10 produced by the plaintiffs to BASF on I believe
11 November 17th was the date Mr. Placitella cited, we
12 would have cited the Gale deposition in our
13 opposition brief.

14 And I'm not certainly not suggesting
15 that anything intentionally was withheld or done
16 improperly.

17 But the point is we're now hearing
18 there's an explanation that justifies supplementation
19 after the reply brief when we were denied the
20 opportunity to address materials that the plaintiffs
21 had weeks before our opposition brief was due.

22 I also obviously disagree with Mr.
23 Placitella on the import of the document. And I
24 don't want to get ahead of ourselves and start
25 talking about the merits.

1 I would note that we did explain in our
2 papers why we think that this deposition transcript
3 certainly helps BASF in further proving that there
4 was no improper spoliation. But I don't see how it
5 carries any weight for the plaintiffs. And the one
6 example we cited --

7 **SPECIAL MASTER:** Well then why are you
8 objecting to supplementing the record if you think it
9 helps you and hurts them? I don't understand the
10 logic of that.

11 **MR. FARRELL:** The issue is the argument
12 that is included in their supplementation papers and
13 the fact that it is being packaged with the Appendix
14 E and frankly the Appendix D that were included with
15 plaintiffs' reply brief, both of which we thought
16 were themselves improper. And that is really the
17 heart of the objection that we have.

18 **SPECIAL MASTER:** You're not alone in
19 thinking that. But we'll get to that later.

20 **MR. FARRELL:** Thank you, your Honor.

21 **SPECIAL MASTER:** Anything else, Mr.
22 Placitella?

23 **MR. PLACITELLA:** No, your Honor.

24 **SPECIAL MASTER:** I understand the
25 procedural objections that BASF has propounded in

Page 17

1 respect of this application.

2 However, as I've told counsel before, it
3 seems to me that the determination of plaintiffs'
4 crime fraud slash Kozlov exceptions motion is one
5 that goes to the very core of this case, and that is
6 going to be given a fair amount of attention. And
7 anything that is out there that might be helpful to
8 the determination of that motion is something I'm
9 going to want to hear.

10 So I'm going to grant the motion to
11 supplement the record. But that's it. The record
12 is now supplemented by it. You don't get to file
13 another brief arguing what it says.

14 And while we're on the topic of briefs,
15 I want every lawyer in this room to remind me the
16 next time that somebody asks for leave to file an
17 over-length brief that it's denied presumptively.

18 Having gone through all of these papers,
19 and when my wife called last night at 11 o'clock
20 wanting to know where I was, and I was still
21 preparing for today, it doesn't help your cause.

22 I will remind you of Mark Twain's line
23 where he said: Please forgive the length of this
24 letter. I didn't have the time to write you a short
25 one.

Page 18

1 Find the time to write a shorter one,
2 please.

3 So the motion for leave to supplement is
4 granted limited solely to the acceptance of the Gale
5 deposition, which is marked as Exhibit A to the
6 moving papers.

7 **MR. FARRELL:** Your Honor, if I could
8 just raise one issue, I'd appreciate the Court's
9 ruling.

10 **SPECIAL MASTER:** Sure.

11 **MR. FARRELL:** It would just would be if
12 we could add to the Court's order that the materials
13 that have in fact been produced by Johnson & Johnson
14 or frankly any other party that's received a subpoena
15 by the plaintiffs, that those documents be produced
16 to the defendants as soon as possible.

17 **SPECIAL MASTER:** This is the first I've
18 heard of that. I don't think it should be necessary
19 for me to remind the very good lawyers who are in
20 this room that if you issue a third party subpoena
21 and you get documents in response that it's your
22 obligation to get copies of those documents to all
23 the other parties in the case.

24 **MR. FARRELL:** Thank you, your Honor.

25 **SPECIAL MASTER:** That is not an

Page 19

1 earth-shattering proposition. So if there is a
2 problem with that, please bring it to my attention.
3 But that's pretty much pretty standard fare, guys.

4 One down. Three to go. How about we
5 turn to plaintiffs' motion for reconsideration. Let
6 me start that one by setting it up, as I normally do.

7 On October 27, 2017, under ECF number
8 368, an order was entered that required the review of
9 the transcript of the Wengerd deposition to ascertain
10 what objections if any plaintiffs would continue to
11 press at the continued deposition of representative
12 plaintiff Wengerd that was ordered as part of the
13 that order.

14 The order specifically provided that at
15 least 10 days before the continued deposition that
16 list of objections was to be provided to counsel for
17 BASF and to me.

18 By an e-mail dated February the 9th,
19 2017, from Mr. Roth, he enclosed a copy of the letter
20 he had sent to Messrs. Assaf and Farrell listing 24
21 objections that plaintiffs would continue to press in
22 respect of the continued deposition of representative
23 plaintiff Wengerd and also attached a copy of the
24 transcript.

25 On February the 12th, 2017, BASF's

Page 20

1 counsel e-mailed a letter objection to 18 of the 24
2 assertions of privilege made by the plaintiffs.

3 On February the 14th, under ECF number
4 434, an order was entered overruling plaintiffs'
5 objections and ordering that representative plaintiff
6 Wengerd answer all 18 questions and advising that,
7 and I quote, any failure to abide by the terms of
8 this order shall be punishable as contempt, unquote.

9 On February 16, 2017 -- I'm sorry.
10 We're in 2018. All these dates starting with
11 February 9th are in 2018.

12 Under ECF number 442, plaintiff filed
13 this reconsideration motion raising four points.
14 First, that questions about the Williams case and not
15 the underlying case are subject of proper privilege.
16 And those would be questions 1, 2, 4, 7, and 22.
17 And the numbering is from Mr. Roth's original
18 February 9, 2018, letter.

19 Second, that question 5 is moot, as Miss
20 Wengerd actually answered it later on.

21 Third, the questions as to the mediation
22 that had been in this case before, questions 15 and
23 16, are privileged.

24 And fourth, that the questions as to
25 damages, which are questions 8, 12, 20, 21, and 23,

1 also are privileged

2 That same day -- and I remind everyone
3 that February the 16th was a Friday -- I sent an
4 e-mail to everyone asking that any opposition to
5 plaintiffs' reconsideration application be filed by
6 February 21st, quote, so that it can be argued with
7 the other pending motions on Friday, February 23,
8 2018, unquote.

9 On February 17th, Mr. Roth impressed
10 everyone by telling us he was working on a Saturday,
11 and he requested that I, quote, modify the response
12 schedule so we can have a ruling before plaintiff
13 Wengerd's February 21, 2018, deposition.

14 I will note that that was the first time
15 I was advised that the deposition was occurring on
16 February 21.

17 **MR. ROTH:** Actually, I hate to disagree
18 with your Honor --

19 **SPECIAL MASTER:** I know you want to
20 disagree with me. But I will tell you that I have with
21 me your February 9 e-mail with your letter, neither
22 of which says the deposition is occurring on February
23 21.

24 **MR. ROTH:** Your Honor e-mailed me back
25 about 20 minutes later to ask when the deposition was

1 taking place. And I responded with an apology,
2 saying I apologize for not mentioning it in my
3 initial letter, the deposition is taking place on
4 February 21st.

5 And that happened on February 9th, your
6 Honor.

7 **SPECIAL MASTER:** Okay.

8 **MR. ROTH:** I think as we work our way
9 through this, and I hope the blood is not showing,
10 but there's been a lot that's happened since then.

11 **SPECIAL MASTER:** You redeemed yourself
12 later on, Mr. Roth. I'm getting there.

13 **MR. ROTH:** Okay.

14 **SPECIAL MASTER:** On that same day, I
15 sent an e-mail to Mr. Roth denying the modification
16 of the response schedule.

17 Again that same day Mr. Roth sent an
18 e-mail saying that they would just simply reschedule
19 the Wengerd deposition.

20 That evening Mr. Farrell sent an e-mail
21 objecting to the rescheduling of the deposition of
22 representative plaintiff Wengerd.

23 I note all of this is on a Saturday.
24 And let me also say that in those e-mails everybody
25 was apologizing for interfering with my weekend.

1 Let me repeat again what I've said
2 before. I am here to help you get to where you need
3 to be. And as you can tell, I do read your stuff in
4 real time and I try to respond in real time. So you
5 don't need to apologize for doing your job.

6 So in the future, just assume that I'm
7 going to add words at the beginning of whatever
8 communication you have that say I'm really sorry for
9 being a pain and just skip that and just go on to the
10 subject matter.

11 The next day I got an e-mail from Mr.
12 Roth responding to Mr. Farrell's objections.

13 I then sent an e-mail to both Messrs.
14 Roth and Farrell explaining the procedural posture of
15 this matter.

16 On the 20th I received an e-mail from
17 Mr. Roth advising that the parties have agreed to
18 adjourn the Wengerd deposition.

19 Quite frankly, that's exactly what the
20 parties should have done without any intervention.

21 That same day I sent an e-mail to Mr.
22 Roth talking about what the limited issues were and
23 discussing his proposal for a Federal Rule of
24 Evidence 502(d) order.

25 On February 21, under ECF 444, BASF

1 filed its response, advising that the plaintiffs had
2 agreed to withdraw most of their motion for
3 reconsideration. The only issues that remained were
4 questions 1 and 5 and 9 and 22. And basically
5 BASF's objection is that plaintiffs had failed to
6 meet the reconsideration standard that is in local
7 Civil Rule 7.1(i).

8 Mr. Roth, are you going to be speaking
9 to this?

10 **MR. ROTH:** Yes, your Honor. I was
11 going to say Mr. Coren will, but we did that the last
12 time.

13 **SPECIAL MASTER:** He took a beating over
14 this before.

15 **MR. PLACITELLA:** I thought I took the
16 beating.

17 **SPECIAL MASTER:** You deserved the
18 beating. There's a difference.

19 **MR. PLACITELLA:** Not the first time.

20 **MR. ROTH:** I think your Honor's sized up
21 where the parties are in you are e-mail of February
22 22nd.

23 And to the extent there are issues with
24 respect to privilege, it is regarding communications
25 in the Williams case.

1 Mr. Assaf actually summarized where we
2 were pretty well I think in his February 22nd letter.
3 When Miss Wengerd's deposition was adjourned, we did
4 take the deposition of another class
5 representative --

6 **SPECIAL MASTER:** Miss Holley.

7 **MR. ROTH:** -- Miss Holley that
8 continued. Mr. Assaf and I had, without the Court's
9 intervention and any e-mails over any long holiday
10 weekends that I'm no longer apologizing to, although
11 I thought my last e-mail apologized to everybody, not
12 just your Honor, were able I think to navigate the
13 issues of the privilege.

14 Our position is that any communication
15 between a class representative and their lawyers in
16 the Williams case, which would be Cohen, Placitella &
17 Roth, or Jeff Pollock from Fox Rothschild, is
18 privileged.

19 **SPECIAL MASTER:** I got that. But my
20 problem is what about those instances where Mr. Bevan
21 was also present? He's not acting as counsel.
22 Doesn't that destroy the privilege?

23 **MR. ROTH:** In our view it does not
24 destroy the privilege.

25 **SPECIAL MASTER:** Why not?

1 **MR. ROTH:** Because there's two -- I
2 mean, he's still their counsel in certain ways, your
3 Honor. And the divide that Judge Linares recognized,
4 the limited waiver, relates to communications with
5 Mr. Bevan and his clients and the facts he was told,
6 decisions and recommendations he made in the
7 underlying cases.

8 We agree to the -- the issues -- or the
9 conversations that have been put in issue is what he
10 knew, what he told his clients, and what
11 recommendations he made to his clients in the
12 underlying cases.

13 **SPECIAL MASTER:** In respect of the
14 disclosure or non-disclosure of documents or
15 information by BASF.

16 **MR. ROTH:** At that point he would not
17 have known whether things were not disclosed.

18 **SPECIAL MASTER:** Right. But he now
19 does, since your client had put that matter at issue.

20 **MR. ROTH:** Right.

21 **SPECIAL MASTER:** Chief Judge Linares has
22 said very clearly that because it is at issue, you
23 cannot claim privilege.

24 So if you've got somebody in the room in
25 respect of whom you cannot claim privilege, doesn't

Page 27

1 he serve to destroy the privilege because he is an
2 outsider?

3 **MR. ROTH:** With respect to the
4 underlying claims, we cannot prove privilege -- we
5 cannot claim privilege.

6 With respect to counsel, he may have
7 given them about -- you know, they say to him: Mr.
8 Bevan, you know, Placitella, Coren and Roth, you
9 know, should I do something here?

10 That, your Honor, is privileged.
11 That's legal advice that they are seeking. They
12 still have a legal relationship with him. That is
13 not --

14 **SPECIAL MASTER:** I don't know how that's
15 legal advice. Should I do something with them? That
16 doesn't help.

17 **MR. ROTH:** Fair enough, your Honor.
18 Should I go forward in a class action arising from
19 what they describe occurred here? Mr. Bevan, how
20 long will this case go? Mr. Bevan, is there -- you
21 know, what do I do as a class representative?

22 I don't know that he's had any of those
23 conversations. But to the extent that he has had
24 them, those are privileged and those are not waived.

25 **SPECIAL MASTER:** I agree with you --

1 **MR. ROTH:** Right.

2 **SPECIAL MASTER:** -- to a degree. My
3 problem is I'm dealing with a very truncated record,
4 because I have a question, for example, question
5 number 1, and the colloquy appears on the deposition
6 transcript at page 12, lines 5 to 23.

7 Question: And what was the nature of
8 that communication?

9 That's subject matter. And
10 attorney/client privilege was interposed.

11 Then the question became: Did you speak
12 to Mr. Bevan on Tuesday about the Williams case or
13 something else?

14 That's not privileged. Okay. That's
15 not asking for advice. Did you discuss a certain
16 subject matter? That's not privileged.

17 But you got an attorney/client
18 privilege.

19 **MR. ROTH:** Well, because what was the
20 substance of that -- what was the nature of that
21 conversation, your Honor, is a question that could
22 yield an answer that is attorney/client privilege.

23 **SPECIAL MASTER:** Only if you go further,
24 because if the answer is we discussed the Williams
25 case, then you've got a privilege. But if the answer

Page 29

1 is we discussed my original claim that I settled or
2 otherwise disposed of based upon the information that
3 I got, that's been waived. So I don't know enough.

4 **MR. ROTH:** And I think this is why --
5 one of the challenges in looking at the questions
6 that are listed here and even in the letter attaching
7 the appendix, there's ambiguity in terms of the way
8 the questions are asked. There is agreement about
9 the nature of information that can be revealed.

10 If my client is asked what was the
11 nature of the communication, I think all of us know,
12 it's not always clear what a client -- how a client
13 is going to answer a question, in my view that risks
14 revealing attorney/client communication.

15 Did you speak with Mr. Bevan on Tuesday
16 about the Williams case or something else, you know,
17 that question is not attorney/client privilege.

18 **SPECIAL MASTER:** But an assertion was
19 made.

20 **MR. ROTH:** Well, I'm moving past these
21 four questions, which I don't expect would be
22 repeated in this way, your Honor.

23 And the example of the Holley deposition
24 that we took on the 21st, you know, I think reflects
25 the success of how we were able to work this out.

1 The issue is not so much --

2 **SPECIAL MASTER:** So let me just make
3 sure I understand.

4 **MR. ROTH:** Yeah.

5 **SPECIAL MASTER:** What you're telling me
6 is, without telling me, that if we get to the
7 continued deposition of representative plaintiff
8 Wengerd and a more artful question is presented on
9 this subject matter, she will be allowed to answer
10 it?

11 **MR. ROTH:** Yes, your Honor.

12 **SPECIAL MASTER:** Okay.

13 **MR. ROTH:** We spent a fair amount of
14 time on this, Mr. Assaf and I. And, you know, again,
15 the questions which we've used here, because we had
16 to identify 10 questions, really are a reflection.
17 The issue is what's the -- because there may be a
18 question that we object to because it is inartful or
19 we think it's --

20 **SPECIAL MASTER:** Because it is what?

21 **MR. ROTH:** Inartful or raises the
22 prospect of revealing an attorney/client privilege.
23 What we know and what we are not -- well --

24 **SPECIAL MASTER:** Well then isn't it your
25 objection an objection to the form of the question

1 instead of asserting the privilege?

2 **MR. ROTH:** If the question is -- in my
3 view, if the question is what was the nature of that
4 communication, I'll object and say that raises the
5 risk of attorney/client privilege. If the question
6 is did you speak to Mr. Bevan --

7 **SPECIAL MASTER:** See, I don't agree with
8 you on that. I don't agree. I even think that as
9 open-ended a question as what was the nature of that
10 communication is asking for the topic, not for what
11 was discussed.

12 **MR. ROTH:** To me that question is what
13 did you talk about with Mr. Bevan.

14 **SPECIAL MASTER:** What did you talk
15 about, yeah.

16 **MR. ROTH:** Well, so what did you talk
17 about is --

18 **SPECIAL MASTER:** We talked about the
19 Williams case, period.

20 **MR. ROTH:** Okay.

21 **SPECIAL MASTER:** And at that point
22 that's a hard stop. But if the answer is we talked
23 about what happened in my prior case --

24 **MR. ROTH:** There's no dispute about
25 that.

1 **SPECIAL MASTER:** How do we know that
2 unless the witness is allowed to answer?

3 **MR. ROTH:** So I'm agreeing with you,
4 your Honor.

5 **SPECIAL MASTER:** Okay.

6 **MR. ROTH:** And I agree with Mr. Assaf
7 about that. And that's the substance of it.

8 I mean, the testimony that we -- the
9 questions that we would object to are those that
10 impugn the attorney/client privilege that exists in
11 the Williams case, period.

12 To the extent that it's the underlying
13 case, to the extent it's conversations or why did you
14 make a decision about -- you know, why did your
15 mother make a decision to settle her underlying case,
16 there is no objection.

17 When it was close, one of two things
18 happened in the Holley deposition. Mr. Assaf
19 rephrased his question or I objected, advised the
20 client that this is something I would not allow you
21 to answer, and we agreed on a 502 -- that it would be
22 under a 502 order if the issue had to be resolved.

23 So, you know, I think in large measure
24 we have worked out --

25 **SPECIAL MASTER:** We have detente here.

1 You've agreed on the rules on which you're going to
2 proceed --

3 **MR. ROTH:** I think we've agreed on the
4 rules on the road, your Honor.

5 **SPECIAL MASTER:** -- short of mutually
6 assured destruction.

7 **MR. ROTH:** Well, when you're sitting
8 there with an order that tells you you're going to
9 run the risk of contempt --

10 **SPECIAL MASTER:** It does have a salutary
11 effect, doesn't it?

12 **MR. ROTH:** And I don't want to find
13 myself in the middle of a deposition where I'm in
14 good faith asserting an attorney/client privilege on
15 Williams communication to come back and be told I've
16 wasted their time and money going to Cleveland to
17 take Miss Wengerd's deposition, I've wasted your
18 Honor's time, and I'm writing all of these from
19 some -- I don't know where you put people in civil
20 contempt these days.

21 But I wanted to avoid all of that. So
22 I think we've worked out the process.

23 With respect to the other questions,
24 your Honor, there are questions about damages for
25 which we will make our objection, we will not

Page 34

1 instruct witnesses not to answer. Frankly, some of
2 these just seem improper.

3 **SPECIAL MASTER:** But I'm sure that if
4 the question is improper because of form, you would
5 say I object to the form, it's misleading, this is
6 what I would suggest, because that's what good
7 lawyers do.

8 **MR. ROTH:** Right.

9 **SPECIAL MASTER:** And the good lawyer on
10 the other side is going to say thank you, let me ask
11 that question.

12 And they're going to do it not
13 necessarily because they agree with you, but because
14 that moves the deposition along.

15 **MR. ROTH:** Right.

16 **SPECIAL MASTER:** It's practical.

17 **MR. ROTH:** Well, I try not to make a
18 speaking objection. And then they're going to ask
19 the question that they want to ask.

20 And I think that we see the world
21 differently on the propriety of these questions, your
22 Honor, but some of them asking -- you know, the
23 example I gave in the letter, what would your mother
24 have been paid if there been an honest record,
25 there's no purpose in my view to that.

1 **SPECIAL MASTER:** I can see the purpose
2 to it. But an answer of I have no idea would be
3 perfectly proper, too.

4 **MR. ROTH:** Right. But we're not seeking
5 reconsideration on those.

6 **SPECIAL MASTER:** Well, let me just give
7 you a sense of where I'm coming from and maybe we can
8 reach agreement on how to do this.

9 As you've said, discussions by any of
10 the representative plaintiffs with Mr. Bevan about
11 the original cases, those are fair game. That
12 privilege has been waived.

13 Discussions with Mr. Bevan about this
14 case are a little more problematical because Mr.
15 Bevan is not representing those plaintiffs in this
16 case. So I don't know what the attorney/client
17 relationship is in respect of this case. Somebody's
18 going to have to flesh that out for me at some point
19 if it becomes an issue.

20 Because of that, I'm troubled by
21 discussions between the Cohen, Placitella & Roth firm
22 and the representative plaintiffs where Mr. Bevan is
23 also a party to those discussions, because he is not
24 there to provide legal advice. Cohen, Placitella &
25 Roth, counsel of record, are there to do that, which

Page 36

1 means he's a stranger to that conversation, which in
2 my book destroys the privilege, because you've
3 allowed a third party in.

4 I'm just telling you where I'm coming
5 from, okay, so that when you folks sit down and
6 retake this deposition, you understand that if you
7 get to a juncture where you reach an impasse and you
8 say: Well, let's call the Special Master and have
9 him call the question, you understand where I'm going
10 to be coming from.

11 **MR. ROTH:** The issue that you're
12 raising, your Honor, has not come up in the
13 questions. It hasn't been briefed.

14 Frankly, we would demonstrate to you
15 that there's a common interest that applies here
16 under New Jersey law. And when the time comes,
17 we'll brief that.

18 **SPECIAL MASTER:** Mr. Bevan has no common
19 interest with anybody here.

20 **MR. ROTH:** Well, I think that because
21 you and -- you know, and I've read Mr. Assaf's papers
22 where he is a fact witness in some regard --

23 **MR. ASSAF:** A critical fact witness.

24 **MR. ROTH:** Where he is, as Mr. Bevan
25 says, a critical fact witness --

Page 37

1 **SPECIAL MASTER:** Mr. Assaf says.

2 **MR. ROTH:** As Mr. Assaf says. And Mr.
3 Bevan may say it too.

4 But that does not eliminate the fact
5 that he also serves as their counsel in cases that
6 are going forward here. And so --

7 **SPECIAL MASTER:** I'm sorry, I need you
8 to say that last little piece, in cases that are
9 going forward.

10 **MR. ROTH:** He is --

11 **SPECIAL MASTER:** Is he the counsel of
12 record for any cases on behalf of any of the
13 representative plaintiffs that are still going
14 forward?

15 **MR. ROTH:** Yes, your Honor.

16 **SPECIAL MASTER:** Which one?

17 **MR. ROTH:** Miss Holley.

18 **SPECIAL MASTER:** Miss Holley?

19 **MR. ROTH:** Yeah. And I'm not sure about
20 others where there are bankruptcy claims that have
21 been filed that --

22 **SPECIAL MASTER:** Well, don't we need to
23 know that?

24 **MR. ROTH:** Sure.

25 **SPECIAL MASTER:** Okay. And I think

1 counsel for BASF is entitled to know that too in
2 order that they could properly gauge what objections,
3 if any, they can fight.

4 The net result of all of this -- and I
5 honestly don't think this merits that long of a
6 discussion. And I don't think we really need to hear
7 from BASF in respect of this.

8 You know where I'm coming from. I have
9 no doubt that now that everyone kind of understands
10 what the rules of game are, that you'll be able to
11 work these things out in the continued deposition of
12 Miss Wengerd and of anybody else, frankly, in this
13 case who might have similar claims.

14 When is her continued deposition going
15 to be taken?

16 **MR. ROTH:** We've talked about March 6th.
17 I have some dates for Mr. Assaf for some other
18 clients. But it's going to be lined up pretty
19 promptly.

20 **SPECIAL MASTER:** Okay. Good. Well,
21 what I'm going to do is I'm going to deny the motion
22 for reconsideration without prejudice based on what
23 I've described here today.

24 But I fully expect counsel to work
25 cooperatively to work out any privilege objections

Page 39

1 that may still exist in respect of the continued
2 deposition of representative plaintiff Wengerd.

3 If you get to an impasse, and I hope you
4 don't, but if you do, you all have my phone number,
5 so give me a call. And if you get the voicemail, one
6 of the bad things about the year of our Lord 2018 is
7 that we're not untethered anymore. Our system sends
8 me an e-mail that tells me I have a voicemail that I
9 can listen to from wherever I am. So I can run from
10 you, but I cannot hide.

11 And again, do not be shy. If you need
12 help getting through something, call me. And don't
13 apologize for it. That's what I'm here for.

14 **MR. ROTH:** Thank you, your Honor. As I
15 said, I think the example of the Holley deposition
16 proves that we can work this stuff out.

17 **SPECIAL MASTER:** I have no doubt. I
18 have no doubt. You're all really fine lawyers.
19 This can be an acrimonious case. But I'm hoping that
20 most of the acrimony has been expended in the prior
21 seven years and we can move on without it, since this
22 case next month will be seven years old.

23 **MR. ASSAF:** Your Honor, I appreciate
24 your order. And I'm not going to -- I've learned
25 enough that I'm not going to say anything.

Page 40

1 But I do want to put a marker down. I
2 don't want you to think that the Bevan issues are
3 going away.

4 I think the collateral issues that we've
5 already identified, I think five of the six of them
6 have to do with Mr. Bevan. And so I think we're
7 going to come back to this issue because there are
8 complex issues regarding Mr. Bevan, what he knows and
9 when we're going to find it out.

10 **SPECIAL MASTER:** I appreciate that, Mr.
11 Assaf. But I guess my hope is that if we get to that
12 juncture, we get to it further down the pike, because
13 the evolution of this application was 24 assertions
14 of privilege, 18 objections, which meant that you
15 conceded that six of those were proper or perhaps you
16 didn't think they were worth the fight. But either
17 way --

18 **MR. ROTH:** I'll take the concessions,
19 your Honor.

20 **MR. ASSAF:** It's the latter, your Honor.

21 **MR. ROTH:** I think it's the first one
22 from Kirkland & Ellis. I'll take them right now.

23 **MR. ASSAF:** The first one since 2011.

24 **SPECIAL MASTER:** Cherish it. I don't
25 think you'll get many more.

Page 41

1 But it went from 24 to 18. And it's now
2 four and -- not really four.

3 So if you guys could work your way to
4 that before you kind of throw your hands up and say,
5 okay, we can't really resolve it among ourselves,
6 that would be what I would be looking for.

7 **MR. ASSAF:** Fair enough, your Honor. I
8 appreciate that. And I think we're aligned. One of
9 the points in the letter and one of the points that
10 Mr. Roth and I discussed was actually getting a
11 little more of a record so that your Honor has a full
12 record and understands all the issues.

13 And so that's what we're trying to do.
14 And I think we're all aligned on that.

15 **SPECIAL MASTER:** Okay. And as you know
16 by now, if you send me something, I read it.
17 Sometimes I actually understand it. So I'm here to
18 try to help you get there.

19 **MR. ASSAF:** Thank you.

20 **MR. ROTH:** Thank you, your Honor.

21 **SPECIAL MASTER:** Two down. Two to go.

22 Let's talk about plaintiffs' motion to
23 compel. I'm going start a little bit differently
24 than the motion itself because this is a motion that
25 really refers back to an order that was entered on

1 October 27, 2017, under ECF 365, where the
2 application by plaintiffs seeking an order to compel
3 BASF to produce, and I quote, any indemnification,
4 forbearance, standstill, settlement, arbitration,
5 joint defense, or like agreements related to this
6 litigation or to this and similar litigations by and
7 between BASF and any or all of BASF's codefendants
8 was denied without prejudice, specifically because
9 the application was made in the absence of a showing
10 of particularized need.

11 Now, with that as backdrop, on January
12 24, 2018, plaintiffs filed ECF 414, which was their
13 motion to compel first a declaration by defendants as
14 to whether they will seek allocation of fault at
15 trial and the production of all documents regarding
16 any settlement or other agreement among defendants
17 that affect their liability to one another for claims
18 arising from the case.

19 Plaintiffs recognize that there are no
20 cross-claims asserted between the defendants.

21 They state that the denial in ECF 365
22 was based on a lack of knowledge as to the existence
23 of the agreements.

24 I'm not altogether sure that is correct.
25 I just read what the order provides. And it says

1 that it's in the absence of a showing of
2 particularized need.

3 Plaintiffs ask that defendants be
4 required to advise whether those agreements exist
5 and, if so, to produce them.

6 They say the agreements are probative of
7 bias or motive. They claim that, quote, if
8 defendants have reached a settlement between them
9 where they have agreed they will not seek
10 apportionment of fault at trial or will not point the
11 finger at one another, plaintiffs have a right to
12 know that, unquote.

13 Plaintiffs claim a particularized need,
14 saying that the settlements among defendants, quote,
15 could influence the record testimony being developed
16 and must be disclosed, unquote.

17 They assert that the documents are
18 needed for breach of duty claims. I'm not sure what
19 claims are referred to there.

20 Specifically, plaintiffs argue four
21 separate things.

22 First, that the New Jersey Joint
23 Tortfeasor Contribution Act gives, quote, plaintiffs
24 the right to know whether defendants have agreed not
25 to blame one another at trial for the torts alleged

1 or if they are not seeking contribution.

2 And in support thereof, the plaintiffs
3 cite to Young versus Latta and Jones versus Morey's
4 Pier, Inc.

5 Plaintiffs assert that, quote, BASF must
6 disclose any settlement releases or similar covenants
7 with its codefendants because plaintiffs have the
8 right to know whether it will seek apportionment at
9 trial, unquote.

10 Second, they argue that the production
11 of settlement agreements should be compelled because
12 they may prevent BASF from invoking attorney/client
13 privilege and are probative of each defendant's bias.
14 They claim that it may lead to abolishing the
15 privilege under New Jersey Statute 2A:84A-20(2)(c).

16 For those of you not in the know, that
17 is the New Jersey attorney/client privilege statute.
18 We're going to talk a little bit more about that
19 later.

20 They say that the settlement agreements
21 are probative of bias and therefore there's a
22 particularized need because of the bias or are
23 necessary to establish some other material issue in
24 the case and that at the very least the settlement
25 agreements, if they exist, should be produced for in

1 camera inspection.

2 On January 24, 2018, under ECF 415, BASF
3 filed a letter saying that the plaintiffs had failed
4 to satisfy the requirements of local Civil Rule 37.1
5 in respect of conducting a meet and confer.

6 And on February 5, 2018, under ECF 424,
7 BASF filed its formal opposition to plaintiffs'
8 motion to compel, asserting the following: First,
9 plaintiffs' request was denied earlier and nothing
10 had changed, that the motion is really nothing more
11 than a request for reconsideration without satisfying
12 the reconsideration standards, and there was no
13 showing of particularized need.

14 Second, there is no waiver of the
15 attorney/client privilege, and they say that the
16 statute I just cited applies only in conflicts
17 between lawyers and their clients, not third parties.

18 And it's probably helpful to
19 specifically read that section into the record. And
20 that is that the attorney/client privilege, quote,
21 shall not extend to a communication relevant to an
22 issue of breach of duty by the lawyer to his client
23 or by the client to his lawyer.

24 Third, they argue that defendants are
25 not required to disclose now whether they intend to

1 argue allocation of fault at trial. They say that
2 New Jersey Court Rule 4:7-5(c) on which plaintiffs
3 relied does not apply in federal court.

4 Made me remember my first year of civil
5 procedure class with Professor Schlesinger.

6 They also say that that Rule applies
7 only to settlements between plaintiffs and
8 defendants, not settlements among defendants, that
9 plaintiffs identify no other requirement that BASF
10 disclose any allocation of fault agreements now.
11 Therefore, the application is premature and that
12 allocation of fault does not equal waiver of the
13 attorney/client privilege.

14 On February 5, 2018, under ECF number
15 425, Cahill Gordon filed their opposition to
16 plaintiffs' motion to compel. They state that
17 plaintiffs' request is not required by law and in any
18 event is premature, that plaintiffs again failed to
19 make a showing of particularized need.

20 They distinguish Young versus Latta, one
21 of the cases relied on by the plaintiffs, and that
22 there should be no in camera review without a prior
23 showing of particularized need.

24 On February 12 under ECF number 430,
25 plaintiffs filed their reply, essentially saying that

Page 47

1 the local Civil Rule 37.1 meet and confer requirement
2 would have been futile under the circumstances, that
3 it is not reconsideration because of the prior motion
4 was denied without prejudice, so it's a brand new
5 motion, that plaintiffs are entitled to know if
6 defendants will seek apportionment at trial, that the
7 Comparative Negligence Act, not the Joint Tortfeasor
8 Act, allows disclosure, that the disclosure
9 encourages settlement, that these agreements would be
10 proof of bias, motive, or scienter, and they are
11 probative of whether BASF waived the attorney/client
12 privilege, finally, that the disclosure is required
13 under Federal Rule of Civil Procedure 34(b)(2)(C),
14 which requires disclosure of whether responsive
15 documents to a request for production are being
16 withheld.

17 And my final notation on this page is
18 Groundhog Day. I'm referring not to the special
19 event that happens in February in Punxsutawney,
20 Pennsylvania, but to the movie of that title.

21 **MR. COREN:** Your Honor, if you're asking
22 who's going to be speaking to it on the plaintiffs'
23 side, I'm going to speak.

24 **SPECIAL MASTER:** I was waiting to see
25 who was going to volunteer.

1 **MR. COREN:** Me.

2 **SPECIAL MASTER:** Good. Mr. Coren, the
3 floor is yours.

4 **MR. COREN:** Thank you. Your Honor, it's
5 not groundhog's day. We're here because we're at a
6 point where we're entering into discovery and, quite
7 candidly, we have a right to know what positions are
8 going to line up by the defendants amongst
9 themselves.

10 **SPECIAL MASTER:** What's the basis of
11 that right?

12 **MR. COREN:** The basis -- and, you know,
13 we got chastised for citing a New Jersey Rule. I went
14 back and looked at the section where we cite to that
15 and actually we're citing to the rule, meaning the
16 rule of law. And that's the rule in Young versus
17 Latta.

18 And that rule states, and I'm going to
19 quote the Court: A plaintiff should know as early in
20 the case as possible whether a defendant will seek to
21 prove the fault of a codefendant. Plaintiff should
22 conduct their discovery accordingly.

23 Now, your Honor, we got the answers.
24 And the answers didn't have a cross-claim.

25 **SPECIAL MASTER:** Doesn't that tell you

Page 49

1 that they're not going to be seeking something
2 against the other codefendants?

3 **MR. COREN:** No, it doesn't, your Honor.

4 **SPECIAL MASTER:** On what basis can they
5 make that assertion if there's no cross-claim?

6 **MR. COREN:** Well, your Honor, Young
7 versus Latta said you don't need to file a
8 cross-claim because down the road somebody could
9 settle and that they could pursue their cross-claim.
10 That is what happened actually in Young
11 versus Latta.

12 And then if we skip to the most recent
13 decision, Morey --

14 **SPECIAL MASTER:** But stay with me, okay.
15 Let's stay with Young versus Latta, because in the
16 Young versus Latta circumstance where you had an
17 agreement -- well, you had a question of
18 contribution between a non-settling defendant and a
19 settling defendant. But that settling defendant
20 settled with the plaintiff, not with the codefendant.

21 **MR. COREN:** That is the fact pattern.
22 But as from Young -- that was the first instance.
23 But Young is the starting point of a series of cases
24 from the 90s going up to as most recently 2017, your
25 Honor.

1 **SPECIAL MASTER:** Well, before we get to
2 Morey's Pier, let's talk about Young versus Latta,
3 because that is the starting point. And doesn't
4 Young versus Latta also say that a non-settling
5 defendant is entitled to a credit for the settlement
6 paid by the settling defendant equal to the
7 allocation made by the jury?

8 **MR. COREN:** Yes.

9 **SPECIAL MASTER:** So it's a question of
10 the non-settling defendant getting a credit for what
11 the settling defendant paid to the plaintiff.

12 **MR. COREN:** Yes.

13 **SPECIAL MASTER:** And it's based upon the
14 allocation that is made by the jury, who may or may
15 not be told that the empty chair defendant settled
16 with the plaintiff.

17 And in fact, under New Jersey law, when
18 that jury verdict form is given to the jury, there is
19 a list of every defendant and it's the jury's
20 obligation to outline percentages of fault, because
21 it may have an effect on whether the plaintiff
22 recovers at all. Right?

23 **MR. COREN:** Understood, your Honor.

24 **SPECIAL MASTER:** Okay.

25 **MR. COREN:** Okay. But before there was

Page 51

1 Young versus Latta, there were did two statutes, the
2 Tortfeasors Contribution Act and the comparative,
3 which gives us those percentages. So there were the
4 statutes.

5 **SPECIAL MASTER:** Right. The statutes
6 have to be applied somehow. And I'm using the
7 practical application.

8 **MR. COREN:** Correct. And Young versus
9 Latta was the first foray.

10 And if we now jump to 2017 when they
11 come back with Morey's Pier to revisit the issue,
12 they cement the fact that these trials are going to
13 have allocation issues. So before there's a
14 settlement, there's an allocation issue.

15 So we have a right to know if these
16 people are going to sit there and try to lay off the
17 blame on each other, and then why, what evidence do
18 you have, and go to delve into it, because when we
19 look, for example, in the answer of BASF, they said:
20 Well, it could be caused by the fault of other
21 people. But they don't identify the other people.
22 That's paragraph 12 -- excuse me. Bear with me.

23 **SPECIAL MASTER:** It should be an
24 affirmative defense.

25 **MR. COREN:** Yes, it was an affirmative

1 defense, your Honor. It's on their affirmative
2 defense 14: Plaintiffs' damages if any were
3 proximately caused by the acts or omissions of other
4 persons or things for which BASF Catalyst is not
5 responsible and over which BASF Catalyst lacks
6 control.

7 Well, who is that? Because all the
8 other defendants in this case were BASF lawyers.
9 And gosh-darn, BASF had control over their lawyers.

10 So who are we referring to? If they're
11 going to sit there and make allocation arguments --

12 **SPECIAL MASTER:** Well, you're arguing
13 against yourself, because if you're saying that BASF
14 had control over its lawyers, then that affirmative
15 defense doesn't apply.

16 **MR. COREN:** We agree. But that's why
17 we're saying they have never come forward and said
18 whether they are going to make allocation arguments.

19 **SPECIAL MASTER:** I understand that.
20 They have not done that.

21 But what they have done is not assert a
22 cross-claim against the only other set of defendants
23 in this case, which are the lawyers. That has not
24 happened. And the lawyers have not cross-claimed
25 against BASF. There are no cross-claims here.

1 **MR. COREN:** But in New Jersey, as your
2 Honor knows, while we can never suggest a dollar
3 amount, we can suggest allocations. And if there's
4 going to be suggestions of allocations that cut
5 across the ones that we make, we have a right to do
6 that.

7 And that's the lesson in -- that's why
8 we get that language in Young versus Latta, the rule,
9 that a plaintiff should know as early in the case as
10 possible whether a defendant will seek to prove the
11 fault of a codefendant. Plaintiff should conduct
12 their discovery accordingly.

13 And that's why we came back to you, when
14 we get now to the crime fraud exception, because now
15 when we get to the crime fraud exception -- and I'm
16 not trying to preview my colleagues' case, but it's
17 going to pop up, that on page 12 of BASF's response
18 to the crime fraud, they state the following:
19 Starting in the late 1980s, Cahill served as
20 Engelhard's national counsel in personal injury
21 lawsuits alleging that Emtal talc was contaminated
22 with asbestos. Cahill recommended to Engelhard
23 long-range strategy and short-term tactics on an
24 overall basis for all jurisdictions generally as well
25 as in specific jurisdictions. While local counsel

Page 54

1 always were consulted and provided input, all
2 substantive recommendations to Engelhard as to how to
3 respond to those lawsuits in both the long and
4 short-term were made by Cahill.

5 So that language suggests now that they
6 are saying all of the blame lies on Cahill. Sorry to
7 point. Okay. So at this point --

8 **SPECIAL MASTER:** Well, stop. Stop.
9 Assume all of that is true. Lawyers are only the
10 agents of their principal.

11 So even if they were to say that, isn't
12 BASF saying well, it was my agent who screwed up --
13 if someone screwed up, it was my agent. Oh, by the
14 way, I happen to be liable for the action of my
15 agent?

16 How are you -- I don't get the logic.

17 **MR. COREN:** Are they going to say that,
18 your Honor? Or are they going to say Cahill went
19 rogue? Are they going to say: Hey, we told Cahill
20 everything that there was to know and Cahill told us
21 to do this?

22 Well, that's a breach of the duty,
23 because someone wasn't doing their job.

24 And that's why we want to see if there's
25 any agreements out there to see if anyone happens to

1 be making a malpractice claim against anybody or --
2 you know, in good faith, because at that point in
3 time, your Honor under C has to take that under into
4 account.

5 **SPECIAL MASTER:** I don't agree. I think
6 you misread C. I honestly think that C -- first of
7 all, it's an exception to a rule. And the exceptions
8 are to be considered very narrowly. And I read that
9 exception as saying it applies in an argument between
10 the attorney and his client concerning a failure to
11 satisfy a duty. I don't see (2)(C) as giving a
12 third party any rights to try to pierce the
13 privilege. And I've been shown no case law that
14 holds that.

15 And I think the reason there's no case
16 law that holds it is because it just doesn't make any
17 sense.

18 **MR. COREN:** No, your Honor. If Cahill
19 has to defend themselves because all of a sudden BASF
20 is now saying no, it was Cahill, we told them, we're
21 exonerated, they went rogue, Cahill has the right to
22 come back and say: Unh-unh, you knew what was going
23 on, misery loves company. If anything, we're not all
24 responsible. You're not responsible.

25 We haven't heard Cahill -- one peep from

Page 56

1 them saying no in response to that, it wasn't us or
2 we were just doing our client's bidding faithfully.
3 Okay.

4 And that statute was written broad.
5 And, your Honor, with respect, I disagree with you.
6 The statute, the exceptions -- the privilege is read
7 narrowly, not the exceptions. Okay. The
8 legislature used broad language. They knew what a
9 malpractice case was. They didn't limit it to a
10 malpractice case.

11 **SPECIAL MASTER:** I'll tell you candidly,
12 I read your argument in respect of that, and I just
13 don't agree with it.

14 **MR. COREN:** Understood, your Honor. You
15 know, it's one of those things that -- hopefully you
16 will agree that I can read it that way and it's a
17 permissible reading, whether you agree with it or
18 your reading is different.

19 **SPECIAL MASTER:** I am a firm believer
20 that everyone has the right to be wrong. And many
21 people exercise that right quite freely.

22 So go ahead.

23 **MR. COREN:** Also it ties in, your Honor,
24 that, hey, we have to know who's doing what to whom
25 and how in this case.

Page 57

1 **SPECIAL MASTER:** Why do you care? I
2 don't get that.

3 **MR. COREN:** Because if I want to settle
4 this case with -- say I want to settle the case with
5 Mr. Halket, who wants to go out. I need to know if
6 there's any agreements or what are the claims and
7 waive that in, because at a certain point in time I
8 may find that Cahill and BASF are laying the blame if
9 I settle with Mr. Halket on Mr. Halket. Okay. They
10 become liability syncs or like lightning rods.

11 **SPECIAL MASTER:** So it's not litigation
12 purposes but settlement purposes that you think
13 entitles you to get this information?

14 **MR. COREN:** It's one of the reasons
15 we're entitled to it. And in fact --

16 **SPECIAL MASTER:** Can you show me any
17 authority under New Jersey substantive law that says
18 that you have a right to discover information because
19 it's going to help you in settlement, not in
20 litigating the case?

21 **MR. COREN:** No, it's not so much to help
22 in settlement. It helps you evaluate a settlement.
23 Okay. And that is legitimate. And quite candidly,
24 courts foster those conditions.

25 The object is to sit there and to get

Page 58

1 the facts out so people could weigh and people could
2 assess it. That is an impediment that is being put
3 up.

4 Also, defendants at trial will seek to
5 put the fault on whoever we do try to settle with or
6 if we are successful. So we need to -- you know, at
7 that time it has to come out.

8 But in a case like this, we don't have
9 the luxury with a case approaching its seventh
10 birthday to be redoing discovery. People have to
11 know candidly who is doing what to whom and why in
12 this case. What are the positions? Are you going
13 to --

14 **SPECIAL MASTER:** You say that like
15 that's black letter law.

16 **MR. COREN:** It is. Under Young versus
17 Latta it is.

18 **SPECIAL MASTER:** I disagree with you. I
19 don't think that's black letter law. I don't think
20 you have this absolute right, as you say, to get
21 settlement agreements.

22 We argued that the last time around.
23 And I ended up deciding that based on Third Circuit
24 precedent, you only get a settlement agreement on a
25 showing of particularized need.

Page 59

1 So I'm sitting here saying to myself:

2 Okay, where is the particularized need?

3 And I haven't heard anything yet that
4 tells me, okay, this is the particularized need.

5 And I will tell you that saying I need
6 it in order to settle the case, that doesn't cut it.
7 And I don't mean to be rude about it. But it just
8 doesn't do it.

9 **MR. COREN:** Your Honor, the whole
10 purpose of discovery is to let the parties know what
11 they're going to have to meet at trial. We all
12 learned that at law school and that hasn't changed
13 one iota, proportionality, any of these changes.
14 That is the touchstone.

15 We have a right to know if they are
16 going to do an allocation -- take a position on
17 allocation, we have a right to know what facts
18 they're going to adduce to prove their allocations,
19 because at the end of the case, no matter whether
20 they settle or not, the jury's going to be charged to
21 put a percentage on BASF, Mr. Halket, Mr. Dornbusch,
22 Mr. Sloane, Cahill in general, all of them.

23 So if they're going to sit there at
24 trial and come forward affirmatively, fine, tell us
25 now so we can take discovery on that basis. You

1 could, you know, set aside the allocations. But
2 otherwise, we're going to wind up blind at trial.
3 And that's what Young versus Latta says, no, at the
4 earliest time. And this --

5 **SPECIAL MASTER:** Let me try to put it in
6 a different setting for you.

7 Let's assume that you get to trial and
8 the defendants have not told you that they are going
9 to seek allocation. They haven't put you on notice
10 so that you can't get discovery in respect of the
11 allocation issues. And you get to trial.

12 Do you think the trial judge is going to
13 allow allocation under those circumstances?

14 **MR. COREN:** Under Morey I don't believe
15 so, your Honor.

16 **SPECIAL MASTER:** That's what I was
17 getting to.

18 **MR. COREN:** Under Morey, no.

19 **SPECIAL MASTER:** So Morey's Pier tells
20 me that the defendants have a choice to make. They
21 can either put you on notice of allocation, which
22 would then allow you to conduct some discovery hither
23 or yon, or they don't. But if they don't, they run
24 the risk of not being allowed to seek allocation at
25 trial. Right?

1 **MR. COREN:** Yes, your Honor.

2 **SPECIAL MASTER:** So is that really your
3 call to make is it theirs? They're the ones who are
4 running the risk here, not you.

5 **MR. COREN:** The problem is, your Honor,
6 is they have now made the case unseizable against
7 any marginal player in this particular case. Okay.

8 And I think that that cuts against us,
9 because part and parcel of getting the facts out is
10 to be able to make these kind of decisions.

11 And once again, they're taking and
12 they're chilling that right by not at least putting
13 the cards on the table. And all we're --

14 **SPECIAL MASTER:** We're going in -- we're
15 arguing in circles here, because you say that it
16 helps you settle the case. And I said to you
17 helping you settle the case is not a particularized
18 need. And you need particularized need in order to
19 get disclosure of a settlement agreement. So where
20 are we?

21 **MR. COREN:** Well, moving along, your
22 Honor, also to the extent that you disagree with us
23 whether it reaches -- you know, it violates or --
24 excuse me, triggers is the word I was looking for --

25 **SPECIAL MASTER:** That's okay.

1 **MR. COREN:** -- triggers section C, okay,
2 of the lawyer/client privilege statute.

3 **SPECIAL MASTER:** The exception to the
4 lawyer/client privilege statute.

5 **MR. COREN:** Correct. Or what I call
6 the section C exception. We get to explore whether
7 there are facts out there that will trigger that,
8 okay, because you may disagree with me, but on appeal
9 somebody may agree with me.

10 So let us at least get the facts out on
11 the table. Okay. What harm is it going to be to
12 find to -- look, if they don't want to give us the
13 agreement because of some confidentiality or
14 privilege, then they should give it to you in camera.

15 **SPECIAL MASTER:** And what am I to do
16 with it?

17 **MR. COREN:** To see whether or not
18 there's, for example, in the preambles or the
19 recitals, there are any admissions or anything in
20 there that bear upon the subject. We don't know.

21 Is there an indemnity in there, your
22 Honor. And at that point in time that indemnity
23 creates a bias issue that we are entitled to and
24 courts have time and time again -- time in and time
25 out found was a particularized need, allowing the

1 settlement agreement to go. So it might very well
2 be.

3 But sitting here -- first of all, one,
4 are there agreements? Could we finally get on the
5 record somewhere that there are settlement
6 agreements?

7 **SPECIAL MASTER:** I don't know that they
8 need to disclose that to you yet. I really don't.

9 I think you have the burden of making
10 the initial showing of particularized need. Once you
11 do that, then I would look at it in camera ex parte
12 and make determinations in respect of it.

13 But I don't get to my step until you've
14 satisfied yours. Right?

15 **MR. COREN:** Yes. And I believe that we
16 have, given the circumstances of this particular
17 case. We have people already starting to point the
18 finger at the other side. We need to know -- you
19 know, and it all bears upon -- if they're going to
20 make an allocation, if those agreements affect
21 whatever the allocation is or if they've given up an
22 allocation right with an agreement, then we get to
23 know that because the way these statutes run, it may
24 affect it.

25 You're asking me to look what I don't

Page 64

1 know what is in there to tell you anything more,
2 other than the circumstances of this case justify
3 them at least giving you that agreement.

4 **SPECIAL MASTER:** Let me tell you what
5 I'm having real trouble with. And that is your
6 reliance on what BASF wrote about what happened in
7 this matter 30 years ago in their opposition to your
8 crime fraud motion.

9 I didn't see Cahill Gordon or any of the
10 Cahill Gordon defendants take issue with that
11 description. There's nothing that was filed that
12 said, oh, by the way, the way that BASF described it,
13 that wasn't right, that's not how it happened.

14 **MR. COREN:** And if there's a settlement
15 agreement where Cahill's exonerated, that may be the
16 reason why we're not seeing them say, oh, gosh-darn,
17 that ain't what happened.

18 And that's one of the reasons why you
19 need to see that agreement.

20 **SPECIAL MASTER:** Okay. Is there
21 anything else?

22 **MR. COREN:** No, sir.

23 **SPECIAL MASTER:** On BASF's side, who
24 will speak to this?

25 **MR. ASSAF:** Mr. Bress.

1 **MR. BRESS:** Your Honor, Dan Bress for
2 BASF.

3 Judging by your comments, I think I'm
4 going to shorten what I have to say.

5 **SPECIAL MASTER:** That's very wise.

6 **MR. BRESS:** I'm happy to answer any
7 questions. But on the settlement agreement --

8 **SPECIAL MASTER:** Don't follow Mr.
9 Assaf's example of writing 14 notes and having to
10 talk about each and every one.

11 **MR. BRESS:** We've got a lot of notes
12 here and they're all blank, your Honor.

13 I think with respect to this motion,
14 your Honor, there are really two features of it. One
15 was the settlement agreements. Your Honor has
16 already ruled on that. Nothing has changed. There's
17 no particularized need.

18 And with respect to the second piece of
19 this, it essentially asks for an early disclosure
20 about whether BASF intends to blame another party at
21 trial.

22 Our position is that that request is
23 vastly premature and that the New Jersey Rules and
24 case law that are being cited don't apply in federal
25 court and that we don't have an obligation at this

Page 66

1 time before discovery has even begun in earnest and
2 when there's no trial date to make the kind of
3 disclosure that Mr. Coren is claiming needs to be
4 made.

5 **SPECIAL MASTER:** But you do accept the
6 fact that if you are going to seek allocation at
7 trial, you're going to have give the plaintiffs
8 notice of that.

9 **MR. BRESS:** But the question, your
10 Honor, is when. And I don't think --

11 **SPECIAL MASTER:** Well, the case law says
12 at the earliest practicable moment.

13 **MR. BRESS:** Well, but that --

14 **SPECIAL MASTER:** And so at some point or
15 another, that cat's going to have to come out of the
16 bag one way or the other, because the risk you run as
17 a matter of New Jersey substantive law is you will
18 not be allowed to seek allocation if you don't give
19 them notice, because they are entitled to know
20 whether you are going to.

21 Now, the question is here when are they
22 entitled to know that? I'm not so sure that now is
23 the right time.

24 But be that as it may, the choice is
25 yours to make. And that is I'm going to disclose it

Page 67

1 and therefore preserve the right to seek allocation
2 at trial, or I'm not going disclose it, but I'm going
3 to be foreclosed from seeking allocation at trial,
4 because that's what Jones versus Morey's Pier, Inc.
5 says.

6 **MR. BRESS:** Yeah. To me, your Honor,
7 those cases involve a slightly different situation
8 where the plaintiff is not actually prosecuting a
9 claim against the defendant. You either have a
10 settling defendant or an absent defendant. That's
11 not the case here.

12 **SPECIAL MASTER:** Well, in Jones versus
13 Morey's Pier you had a defendant who was dismissed
14 because they didn't -- it was a governmental agency
15 against whom a timely Tort Claims Act notice had not
16 been filed, and therefore you had no cause of action
17 under New Jersey law.

18 But the Court did say that in those
19 circumstances the defendant was entitled to make a
20 third party claim against the dismissed defendant
21 saying that they were negligent and that that
22 negligence was the proximate cause of the plaintiff's
23 damages.

24 So even though dismissed, they still say
25 on the verdict sheet, because the jury could say yes,

Page 68

1 we find the defendant liable, but the defendant's
2 liability is based upon the third party defendant's
3 liability, and there's no recourse against the third
4 party defendant because they've been dismissed for
5 failure to satisfy the Tort Claims Act.

6 **MR. BRESS:** And that's all true, your
7 Honor. But the point that I would make is that when
8 you're talking about an early disclosure obligation,
9 the point of that is to put the plaintiffs on notice
10 that some party not in the case may be blamed at
11 trial that allows the plaintiff to take what's
12 essentially third party discovery against either that
13 settling defendant or that absent defendant.

14 That's not the case here. The
15 plaintiffs have sued Cahill Gordon. They've sued
16 Arthur Dornbusch. They have an obligation in
17 discovery and an incentive to prosecute those claims.

18 So I think it's quite different than
19 Jones and Young, because in those cases, had the
20 defendant not disclosed that there was some potential
21 third party out there they were going to blame, the
22 plaintiffs wouldn't have a reason to build up in
23 discovery whatever responses they were going to make.

24 That's not true here. Here everybody
25 is in the room and the plaintiffs have an obligation

1 having filed suit against everyone to build their
2 claim against everyone.

3 **SPECIAL MASTER:** I understand what the
4 plaintiffs' obligation is.

5 But I want to go back to what I think is
6 the core question in this application. And that is
7 do you agree that if you do not give the plaintiffs
8 notice of allocation, however that comes out, and
9 that it's done in sufficient time for them to prepare
10 for trial, you will not be able to seek allocation at
11 trial?

12 **MR. BRESS:** Your Honor --

13 **SPECIAL MASTER:** The sine qua non of the
14 latter is the former.

15 **MR. BRESS:** Your Honor, I'm not aware of
16 a requirement in federal court that would require
17 that. We haven't even seen the plaintiffs' case at
18 trial and we're allowed to react to that. But I
19 will say, your Honor --

20 **SPECIAL MASTER:** You're in a New Jersey
21 case, sitting in diversity, which Rudy Schlesinger
22 would have said you use the federal procedure under
23 Erie Railroad versus Tompkins, but you look at the
24 substantive law of New Jersey.

25 The substantive law of New Jersey in

Page 70

1 this aspect is the Comparative Negligence Act and the
2 Joint Tortfeasor Contribution Act.

3 And when you read those together and you
4 read the case law that interprets those two statutes,
5 you come away with the conclusion, at least I do,
6 that if you want to seek allocation at trial as a
7 defendant, you need to notify the plaintiff at some
8 point so that they can prepare to meet those
9 allocations squarely.

10 It's no different than any other part of
11 your case as a defendant. You have to let the other
12 side know. That's the way we work.

13 Now, the question is when do you need to
14 do it? That's a different issue.

15 My question to you is much more
16 fundamental than that. And that is do you agree that
17 as a condition precedent of being able to seek
18 allocation at trial, it is your obligation to provide
19 the plaintiffs notice?

20 **MR. BRESS:** Your Honor, I don't think
21 we're having a fundamental disagreement. We're
22 having a --

23 **SPECIAL MASTER:** Well, I'm looking for a
24 really simple yes or no answer. So help me out.

25 **MR. BRESS:** Your Honor, I think that at

Page 71

1 some point in these proceedings we would make that
2 kind of disclosure.

3 **SPECIAL MASTER:** Okay. Is that a yes?

4 **MR. BRESS:** Yes, it's a yes.

5 **SPECIAL MASTER:** Okay. Thank you. You
6 can start with yes and then explain. But I'd like
7 an answer to my question.

8 And you're telling me yes, you have that
9 obligation. I appreciate that because, in candor, I
10 don't think there's any question that you do. So
11 you're giving me the sleeves off your vest. All
12 right.

13 **MR. BRESS:** Your Honor, our central
14 point is just the obligation is not triggered now.
15 And that's what the application asks us to disclose
16 now. We don't think we have that obligation at this
17 time.

18 **SPECIAL MASTER:** So your answer is not
19 that I don't have the obligation, it's just not
20 mature yet, it's not ripe?

21 **MR. BRESS:** Correct, your Honor.
22 There's been very few depositions even in the case.

23 **SPECIAL MASTER:** Anything else, Mr.
24 Bress.

25 **MR. BRESS:** I do not, your Honor. Thank

1 you.

2 **SPECIAL MASTER:** Mr. Coren, you get the
3 last word.

4 **MR. COREN:** Thank you, your Honor.

5 **SPECIAL MASTER:** I get the last word.
6 You get before the last word.

7 **MS. GUSSACK:** Your honor --

8 **SPECIAL MASTER:** Oh, I'm sorry. My
9 apologies. I'm so sorry. You're over to the left
10 and I didn't see you. But you did file --

11 **MS. GUSSACK:** Yes, we do have -- Mr.
12 Boise would like to address the Cahill response to
13 the motion.

14 **MR. BOISE:** Your Honor, just a point.
15 We're certainly reserving the right as to what law to
16 apply to a claim.

17 What ultimately you have here, we're
18 still in the class certification stage of this and
19 what the shape of trial will look like is uncertain,
20 what the relief requested is uncertain.

21 And to make defendants decide on trial
22 strategy, to make that decision and then describe
23 that decision to plaintiffs before those events are
24 also premature.

25 Those are the only two points I wanted

1 to make.

2 **SPECIAL MASTER:** Okay. But don't we
3 have to start from the proposition that you have a
4 diversity case venued in New Jersey, so that by
5 definition -- or I shouldn't say by definition. By
6 default the substantive law of New Jersey would
7 apply, unless at some point somebody comes in and
8 says no, under choice of law principles the
9 substantive law of someplace else applies.

10 Well, the choice of law principles you
11 will be applying will be New Jersey's choice of law
12 principles because that's where you default to first.
13 The forum states substantive law.

14 No one's made a choice of law
15 application in this case yet. It may be that you're
16 giving me a heads-up that one may be coming soon.

17 And I see everybody over there is
18 nodding your heads up and down, which I guess I
19 should gird myself for.

20 But until now there has not been a
21 choice of law application made.

22 So I'm presuming, as I think I'm not
23 only entitled to but I'm required to, that the
24 substantive law we're talking about is New Jersey
25 law.

Page 74

1 Under New Jersey law, we are where we
2 are, which is if you want to make an allocation
3 argument, you got to give notice. I don't think
4 that's real complicated.

5 And I know Mr. Bress fought me on it,
6 but he eventually came to the side of the angels. So
7 I guess I'm going to have to wait until I hear from
8 you on a choice of law application.

9 But until then, I understand your
10 argument about the ripeness of this application. And
11 I guess I'm going to have to abide the latter until I
12 get a choice of law motion that we'll need to address
13 one way or the other.

14 Did I cover your points?

15 **MR. BOISE:** You did, your Honor.

16 **SPECIAL MASTER:** Okay.

17 **MR. COREN:** If I may, your Honor.

18 **SPECIAL MASTER:** Yes, Mr. Coren.

19 **MR. COREN:** Thank you. First off all,
20 the Third Circuit rule that New Jersey law applies
21 because of the positions that were taken, Judge
22 Linares also has held that New Jersey law applies in
23 one of his opinions. We'll get you the citations for
24 that, but it's 350 F.3rd, page 317 with respect to
25 the Third Circuit.

Page 75

1 The ship has sailed, your Honor, on the
2 issue of choice of law. New Jersey law is the law
3 of the case in this matter.

4 **SPECIAL MASTER:** Well, was the -- I
5 don't remember choice of law being argued.

6 **MR. COREN:** Yes, it was argued. And the
7 Third Circuit actually addresses it in the opinion.

8 **SPECIAL MASTER:** What page?

9 **MR. COREN:** 317.

10 **SPECIAL MASTER:** Okay.

11 **MR. COREN:** 316-317, your Honor.

12 **SPECIAL MASTER:** Okay. Bear with me for
13 one second.

14 Okay. 317. Choice of law. Actually
15 the discussion starts at 316.

16 **MR. COREN:** Correct, your Honor. My
17 apology.

18 **SPECIAL MASTER:** That's okay. What it
19 says is that the parties did not litigate the choice
20 of law question before the District Court. The
21 plaintiff claimed that it was under New Jersey law.
22 Quote: BASF and Cahill both agreed that New Jersey
23 law applied and, moreover, the choice of law issues
24 may be waived. Thus, to the extent the parties may
25 have sought the application of other law to the tort

1 claims, they have waived their right to do so.

2 **MR. COREN:** Yes, sir. Judge Linares
3 later will repeat that.

4 **SPECIAL MASTER:** And as you can see,
5 that was all previously highlighted.

6 **MR. COREN:** Understood. There's a lot
7 of paper in front of your Honor. But I felt duty
8 bound to call that to your attention. I don't
9 believe other --

10 **SPECIAL MASTER:** You may bear that in
11 mind, Mr. Boise.

12 **MR. BOISE:** I understand that, your
13 Honor. We're preserving that issue. That was in the
14 context of a motion to dismiss where facts were
15 assumed to be true.

16 And it's our position going forward and
17 at the time and now that that issue has not been
18 waived beyond the motion to dismiss stage.

19 I understand plaintiffs' position. It's
20 an issue that will I think be litigated in the
21 future. It's just another point of not acknowledging
22 here in the face of a direct question whether New
23 Jersey law necessarily applies to this particular
24 issue of allocation. I want to make sure that I'm
25 preserving the record for the very reason that Mr.

Page 77

1 Coren just raised.

2 **SPECIAL MASTER:** Okay. I understand
3 that. I just read Judge Fuentes' opinion where he
4 clearly says it's been waived.

5 **MR. BOISE:** Thank you, your Honor.

6 **SPECIAL MASTER:** And he on the preceding
7 page goes through the discussion of whether choice of
8 law can in fact be waived. And he determines that
9 in the Third Circuit it can and then says in fact it
10 has been waived.

11 So you'll do what you think is
12 appropriate in respect of representing your client.
13 Nobody's going to hold that against you.

14 But I would suggest you might want to
15 take a real hard look at pages 316 and 17 of the
16 Third Circuit's opinion.

17 **MR. BOISE:** I assure you we have, your
18 Honor.

19 **SPECIAL MASTER:** Okay.

20 **MR. COREN:** Your Honor, if I may wrap
21 up, as they said in Young, a plaintiff should know as
22 early in the case as possible whether the defendant
23 will seek proof of fault from a codefendant, which
24 begets the question if not now, when? Because the
25 law says --

Page 78

1 **SPECIAL MASTER:** If not us, who, if
2 you're going to quote the Kennedys.

3 **MR. COREN:** Plus, we're --

4 **SPECIAL MASTER:** Mr. Placitella has
5 sworn he will never play me in Trivial Pursuit.

6 **MR. COREN:** Nor will I, your Honor.
7 Once again --

8 **MR. PLACITELLA:** Although sometimes it
9 feels like we're playing here, but...

10 **SPECIAL MASTER:** No slice of the pie for
11 you today.

12 **MR. COREN:** And, your Honor, we don't
13 think that we're asking for the sun. We may have
14 asked for an awful lot of things on that first
15 go-around.

16 But here we're coming in with a very,
17 very narrow request. We want to know whether there
18 are agreements. If there are settlement agreements,
19 we believe your Honor should see and review them,
20 because if there's any factually in there that begets
21 and helps illuminate the issues, then I think we're
22 entitled to those under general discovery.

23 Thank you, your Honor.

24 **SPECIAL MASTER:** Thank you. Anybody
25 else? No.

Page 79

1 My determination is informed principally
2 by the procedural posture of this case. We have
3 been moving along with the instruction I have been
4 operating under that this case is to be made trial
5 ready as soon as possible.

6 There were to me two large thresholds
7 that needed to be addressed before we could get to
8 that point.

9 One of them was the class certification
10 motion, because that will define the scope and extent
11 of factual and expert discovery that the case needs.
12 And it seemed to me that people's efforts were better
13 served focusing on that first.

14 And as a corollary to that, a
15 determination of plaintiffs' assertion that the
16 communications between BASF and its counsel at
17 Cahill -- and BASF will forgive me, but I use BASF as
18 a shorthand for Engelhard also -- but that the
19 communications between BASF and its counsel at Cahill
20 should be produced because the crime fraud exception
21 or the Kozlov exception would vitiate the assertion
22 of attorney/client privilege.

23 We're on our way to getting some
24 illumination in respect of the second one of those.
25 And we've at least started the process in respect of

Page 80

1 the first, which is the class certification motion.

2 Given the position we are in, it seems
3 to me that the request is premature, so I really
4 don't have to reach the substance of it.

5 If I had to reach the substance of it, I
6 still would have a little bit of trouble with the
7 particularized need part that caused me to deny that
8 same application back in October.

9 So I'm going to deny this motion. And
10 again, it's without prejudice. The plaintiffs may
11 bring it back. It will not be a motion for
12 reconsideration. So you don't have to do it within
13 the next 10 days. Bring it back after we know a
14 little bit more of where this case is headed, because
15 candidly, I don't think that any of the concerns that
16 plaintiffs have raised today or in their moving
17 papers would still be in existence if class
18 certification is denied.

19 So that would be a very different case
20 than the case we have right now and also a very
21 different case from a case if class certification is
22 granted.

23 So it strikes me that everyone's efforts
24 in this room are best directed towards dealing with
25 the class certification issue, because I'm going off

1 the top of my head, but I think we're talking about
2 having a class certification hearing in September.

3 **MR. FARRELL:** October.

4 **SPECIAL MASTER:** October. That's seven
5 months from now. You guys got a lot of things to
6 do. You've got fact discovery in respect of it.
7 That ends in May?

8 **MR. ASSAF:** May 21st.

9 **SPECIAL MASTER:** And then you've got
10 expert discovery that ends shortly after that. You
11 got a lot of stuff to do that I think is important
12 that you do first before we go that route.

13 So I'm not saying you're never going to
14 get it. But I'm simply not in a position today to
15 make that determination. But I'm likewise not in a
16 position to say you should get it today.

17 So the motion is denied without
18 prejudice. Any reapplication will not be a motion
19 for reconsideration. And we'll address it at a more
20 timely date.

21 **MR. COREN:** Thank you for hearing us,
22 your Honor.

23 **SPECIAL MASTER:** My pleasure.

24 **MR. BRESS:** Thank you, your Honor.

25 **SPECIAL MASTER:** Thank you. We've been

Page 82

1 at this now for close to two hours and we're about to
2 get to the other than that, Mrs. Lincoln, how did you
3 like the play motion, so why don't we take a short
4 break.

5 (Break.)

6 **SPECIAL MASTER:** The final formal motion
7 that is before us is the plaintiffs' crime fraud
8 slash Kozlov motion.

9 On November 2nd, 2017, by order and
10 under docket number ECF number 370, plaintiff filed a
11 motion to determine the applicability of the crime
12 fraud and Kozlov exceptions to defendant's privilege
13 claims.

14 By way of background, there are two
15 claimed bases for disclosure. The first is the
16 exception to the attorney/client privilege that's
17 codified at New Jersey Statutes Annotated
18 2A:84A-20(2)(a), that also appears as New Jersey Rule
19 of Evidence 504(2)(a).

20 It states that the attorney/client,
21 quote, privilege shall not extend to a communication
22 in the course of legal services sought or obtained in
23 aid of the commission of a crime or fraud, unquote.

24 The separate basis is In re: Kozlov,
25 which is a Supreme Court of New Jersey decision at 29

1 N.J. 232, 1979, which sets forth a three-part test
2 for the waiver of a privilege or for the exception to
3 the privilege.

4 The first part is that there must be a
5 legitimate need of the party to reach the evidence
6 sought to be shielded; second, there must be a
7 showing of relevance and materiality of that evidence
8 to the issue before the Court; and C, it also must be
9 shown to the satisfaction of the trial judge by a
10 fair preponderance of the evidence, including all
11 reasonable inferences, that the information could not
12 be secured from any less intrusive source.

13 Plaintiffs assert two bases for saying
14 that the communications between BASF and its counsel,
15 Cahill, should be produced, arguing that the crime
16 fraud exception applies and that plaintiffs should be
17 allowed to participate in any evidentiary hearing
18 concerning the specific documents.

19 I note that because, even though the
20 title of the motion talks about the Kozlov exception,
21 it appears in a footnote and only in a footnote in
22 plaintiffs' opening brief, and that would be footnote
23 22, page 37.

24 I'm not going to the say that the Kozlov
25 exception has been waived, but it certainly did not

1 receive any kind of prominence like the exception to
2 the attorney/client privilege was argued.

3 According to plaintiffs, this involves a
4 two-step process.

5 First is an evaluation of the factual
6 basis for a good faith belief that the exception
7 should apply; in other words, a prima facie showing
8 that the exception should apply. And if there has
9 been that prima facie showing, then there's an ex
10 parte in camera evaluation of the privilege by the
11 Court.

12 In going through that process,
13 plaintiffs explain that we apply a reasonable basis
14 standard, and that is whether there is a reasonable
15 basis to suspect that the privilege-holder was
16 committing or intending to commit a crime or fraud
17 and that the attorney/client communication or
18 attorney work product were used in furtherance of the
19 alleged crime or fraud.

20 Plaintiffs state that if the reasonable
21 basis standard is met, an in camera review follows.

22 Plaintiffs argue that the exception does
23 not need to fall within the definition of crime or
24 fraud and provide a number of citations in support,
25 but none of them are from the Third Circuit.

1 Plaintiffs presume that the destruction
2 of evidence equates to spoliation once there's been
3 proof of that, a point that is at issue.

4 Plaintiffs assert that spoliation is
5 anathema to the privilege and that the crime fraud
6 exception applies where a party makes untrue factual
7 representations because that constitutes a fraud on
8 the Court.

9 Plaintiffs assert that deliberate
10 misrepresentations in this case warrant application
11 of the exception.

12 Plaintiffs do concede that, quote,
13 ordinarily crime fraud exception evidentiary hearings
14 are conducted ex parte, but then claim that because
15 they already are privy to the information from the
16 state cases, they should be allowed to participate
17 here and that the Samson record before Justice Stein
18 serving as a special master should be simply produced
19 here on en masse.

20 On January 16, 2018, under ECF number
21 408, BASF notified the clerk that their opposition to
22 plaintiffs' motion was being submitted directly to
23 me.

24 And that opposition says that plaintiffs
25 failed to make a prima facie case, they did not

1 identify any documents, that the documents must be
2 shown to have been in furtherance of the fraud or
3 crime, that plaintiffs failed to satisfy the
4 preponderance of the evidence standard, that the
5 privilege can only be overridden if it is the
6 client's intent to misuse legal services, the
7 plaintiffs failed to identify a single missing or
8 destroyed document and therefore there has been no
9 spoliation, and finally, that any in camera review
10 must be ex parte.

11 They claim that the plaintiffs
12 misconstrue the governing legal standards and that
13 plaintiffs' claims are based on factually incorrect
14 statements about the record, that there should be no
15 disclosure under Kozlov, arguing that Kozlov has been
16 since limited by State versus Mauti, M-A-U-T-I, which
17 is at 208 N.J. 519, decided in 2012.

18 And specifically Mauti says that, quote,
19 only in the most narrow of circumstances such as
20 where a privilege is in conflict with a defendant's
21 right to a constitutionality guaranteed fair trial
22 would the need prong of the Kozlov test be satisfied,
23 unquote. That's at page 538.

24 And I note parenthetically that Appendix
25 C to the defendant's opposition says that it's

Page 87

1 federal cases in the title. It should say it's state
2 cases discussing the in furtherance of standard.
3 Both of them say federal cases. And C is actually
4 state cases. So I did read it.

5 On January 16, 2018, by ECF number 409,
6 Cahill advised the clerk of the court that their
7 opposition was submitted directly to the Special
8 Master. And that opposition essentially joins in
9 BASF's arguments.

10 On January 17, 2018, under ECF number
11 410 there is a letter submitted to the clerk of the
12 court advising that defendant Halket would submit an
13 opposition directly to the Special Master. And in
14 the substance of his opposition, defendant Halket
15 joins in the BASF arguments and says pointedly that
16 plaintiffs' claims are focused on a period that is
17 after Halket left Engelhard.

18 On February 2nd, 2018, under ECF number
19 426, plaintiff filed a reply to the opposition to the
20 motion to determine the applicability of the crime
21 fraud and Kozlov exceptions to plaintiffs' privilege
22 claims.

23 I'm going to take a moment and talk
24 about that reply. The reply consisted of a 28 page
25 brief, plus a five page certification of counsel, a

Page 88

1 new Appendix C listing approximately 61 documents for
2 proposed in camera review, and a new Appendix D
3 consisting of nine pages of plaintiffs', quote,
4 factual rebuttal of BASF's assertions, unquote, plus
5 a new Appendix E, consisting of 44 pages of
6 plaintiffs' spoliation appendix and new exhibits 24
7 through 43.

8 I just want to note for the record that
9 under our local rules, reply briefs are limited to 15
10 pages.

11 Plaintiffs did ask for leave to file an
12 over-length brief not to exceed 35 pages, plus two
13 appendices. Leave was granted, noting however that,
14 quote, adding appendices must be for their proper
15 purpose and not as a subterfuge to exceed the page
16 limitation. Please bear that notion in mind while
17 submitting the reply.

18 I will note that plaintiffs since then
19 submitted three appendices, not the two that they
20 sought leave for, one of which again was a 44 page
21 brief on the issue of spoliation.

22 I was largely tempted to not read it.
23 But I did. So you may argue it. However, what
24 weight I give to it is left to be determined.

25 Plaintiffs claim in their reply that,

1 quote, not only they met but have exceeded their
2 prima facie burden of proving New Jersey statutory
3 crime fraud exception negates BASF's claim to the
4 protection of attorney/client and work product
5 privileges.

6 Plaintiffs claim that defendants now
7 admit that for nearly 30 years they concealed from
8 courts and litigants that Emtal talc contained
9 asbestos and that this admission was long overdue,
10 unquote.

11 Plaintiffs take the view that, quote,
12 the only issue presently presented by plaintiffs'
13 current motion is whether the crime fraud exception
14 applies.

15 What is not before this Court at this
16 stage is to determine which specific documents should
17 be released under the crime fraud exception.

18 Plaintiffs repeat that the exception
19 applies where there is a reasonable basis to suspect
20 that the elements of the exception have been met.

21 They then argue seven different matters.
22 One, that evidence of BASF's fraud is overwhelming;
23 two, that the intent and impact of BASF's fraudulent
24 defense was obvious and lethal; three, New Jersey's
25 crime fraud exception does not require proof that use

Page 90

1 of legal services was in furtherance of a crime or
2 fraud; four, specific document review of all
3 documents produced in the Samson case should start
4 now, saying that the document designation does not
5 start until a prima facie showing has been made;
6 five, that plaintiffs are entitled to participate in
7 the ex parte hearing, if one is ordered of course;
8 six, suggest that we simply adopt the Samson record
9 and rule from there. There are actually eight. I'm
10 sorry. Seven, that we should review the Dornbusch,
11 Sloane, Dembrow, and Halket depositions; and finally
12 that Kozlov, quote, compels production of the claimed
13 privileged documents to.

14 In footnote 8, plaintiffs assert that
15 BASF, quote, implicitly waived its privilege by
16 claiming there is no reliable evidence demonstrating
17 that the Emtal talc and the Johnson mine from which
18 it came ever contained asbestos.

19 On February 7, 2018, under ECF 247, BASF
20 objected to plaintiffs' reply brief. BASF claims
21 that the reply brief was improper by trying to
22 correct deficiencies in plaintiffs' original motion
23 that were highlighted in BASF's opposition.

24 BASF specifically objects to the 44 page
25 Appendix E on spoliation. BASF wants a status

1 conference on how to deal with its reply, largely
2 eschewing the opportunity of a sur-reply. And BASF
3 suggests limited argument on the, quote, in
4 furtherance of, unquote, element. BASF says that's
5 the standard. And plaintiffs say it is not.

6 There is one more item that needs to be
7 added in the mix here. And that is on February 6,
8 2018, and filed on February 9, 2018, the Supreme
9 Court of New Jersey issued an order granting BASF's
10 motion for leave to file an over-length brief and to
11 impound the record pending the disposition of the
12 appeal in the Appellate Division. This has to do
13 with the review of the Samson documents.

14 It ordered that the motion for leave to
15 appeal is granted and the matter is summarily
16 remanded to the Superior Court Appellate Division to
17 consider on the merits, denying the motion for leave
18 to file a reply brief. Apparently that was not
19 needed.

20 So the state of the record is now that
21 the Samson matters are before the Appellate Division
22 with an order of sealing from the Supreme Court of
23 New Jersey.

24 So regardless of what anybody wants, I
25 cannot see those papers and I will not see those

1 papers.

2 Mr. Placitella, you have the floor.

3 **MR. PLACITELLA:** Thank you, your Honor.

4 So we start from the proposition of what
5 are we here to decide? What must the Court decide to
6 determine whether we have established our prima facie
7 case?

8 And we say the standard is there is a
9 reasonable basis to suspect that the privilege-holder
10 was committing or intending to commit a crime or
11 fraud in violation of N.J.S.A. 2A:84A-20(2).

12 Of course, what we're looking here at on
13 the substantive law, and the law we submit is pretty
14 clear, is the New Jersey substantive law on crime
15 fraud, while the procedural law on how we're going to
16 approach this is governed by procedure, federal
17 procedure.

18 In fact, Judge Schwartz in the Newman
19 case, which we attached to our papers, actually in a
20 very similar case where fraudulent concealment was
21 alleged, applied the federal procedural law and the
22 New Jersey substantive law, specifically citing both
23 the Fellerman case in her opinion and the Jedlowski
24 case, which we say are applicable here.

25 **SPECIAL MASTER:** Now, that was when

1 Judge Schwartz was a Magistrate Judge, correct?

2 **MR. PLACITELLA:** Correct.

3 **SPECIAL MASTER:** She's now serving on
4 the Third Circuit Court of Appeals.

5 **MR. PLACITELLA:** Correct. So we then
6 have to look at what's the standard that applies for
7 crime fraud in New Jersey. And that's the statute.
8 Your Honor referred to it before.

9 And it talked about privilege shall not
10 extend to a communication in the course of legal
11 services sought or obtained in aid of the commission
12 of a crime or fraud. It does not statutorily use
13 the words in furtherance of.

14 **SPECIAL MASTER:** But it says in aid of
15 the commission of.

16 **MR. PLACITELLA:** Absolutely correct.

17 **SPECIAL MASTER:** Doesn't that mean the
18 same thing?

19 **MR. PLACITELLA:** It does not mean the
20 same thing.

21 **SPECIAL MASTER:** Why not?

22 **MR. PLACITELLA:** Because it talks about
23 being sought or obtained.

24 **SPECIAL MASTER:** In aid of.

25 **MR. PLACITELLA:** In aid of.

1 **SPECIAL MASTER:** Okay. Doesn't that
2 sound like in furtherance of?

3 **MR. PLACITELLA:** Well, when you look
4 at --

5 **SPECIAL MASTER:** Wait --

6 **MR. PLACITELLA:** Yes.

7 **SPECIAL MASTER:** -- English is not my
8 native language, so you need to help me on this.

9 **MR. PLACITELLA:** Right.

10 **SPECIAL MASTER:** When I read in aid of,
11 for me it's like saying in furtherance of. So you
12 need to tell me why that's wrong.

13 **MR. PLACITELLA:** Because in furtherance
14 of implies that it's only acts that are happening now
15 going forward.

16 In aid of can go back, it can look in
17 time as to the totality of the circumstances. So,
18 for example, let's say --

19 **SPECIAL MASTER:** I don't understand
20 that. You got to explain that a little bit better.

21 **MR. PLACITELLA:** Sure. So under the
22 New Jersey law, if you look at, for example, a case
23 like Jedlowski, what happened in Jedlowski was that
24 the lawyer certified answers to interrogatories with
25 information that was false. And they knew that

1 information was false because of earlier information
2 that was in the files of Owens Corning demonstrating
3 the truth of the information.

4 So what the Court in Jedlowski, which
5 has been cited in the New Jersey Court Rules, said
6 that even though the truth of the information may
7 have not been at the time in furtherance of a fraud,
8 when you tie the two together, you can't have a lie
9 without the truth.

10 So in aid of and in -- so what the
11 Court has done --

12 **SPECIAL MASTER:** I'm sorry, but if I
13 understand what you're arguing right now, you're
14 saying that in aid of is actually a lot broader than
15 in furtherance of.

16 **MR. PLACITELLA:** That's correct.

17 **SPECIAL MASTER:** How does that help you?
18 Doesn't that hurt you?

19 **MR. PLACITELLA:** No, it doesn't hurt us,
20 because what it's saying is that we are permitted to
21 look at the totality of all the circumstances.

22 And the rule of Fellerman is the statute
23 is to be interpreted broadly. The rule of Jedlowski
24 is that the statute is to be interpreted broadly.

25 **SPECIAL MASTER:** But Jedlowski was a

Page 96

1 little bit different, because Jedlowski involved an
2 affidavit or a certification taken by a lawyer that
3 recited facts. Well, the fact that it's a lawyer is
4 irrelevant. He's like any other factual witness at
5 that point. And that's what the Court was treating
6 him as and saying: Well, you have shed your attorney
7 mantel to take the role of a fact witness. As a fact
8 witness, then all those facts then become
9 discoverable.

10 **MR. PLACITELLA:** Well, that's true.

11 **SPECIAL MASTER:** But that's not what we
12 have here.

13 **MR. PLACITELLA:** We absolutely have that
14 here. And I'll explain to you why and I'll show you.

15 We have the BASF general counsel
16 certifying answers -- associate general counsel
17 certifying answers to interrogatories that aren't
18 true. And the same general counsel office has
19 information in its possession directly contrary to
20 the answers to interrogatories that are being
21 certified by the same office. That's Jedlowski.
22 That's what happened.

23 So what Jedlowski says is you are
24 allowed to look at the truth in order to expose the
25 lie.

Page 97

1 And that's why I say it's not just in
2 furtherance of. You are allowed to -- and the law is
3 pretty clear. Ocean Spray is the same thing. You
4 can't have a lie -- you can't prove a lie without the
5 truth. So you have to link the two.

6 So what ends up happening under our law,
7 instead of just the words -- it's kind of part of
8 the res gestae, your Honor, where --

9 **SPECIAL MASTER:** I hate that term.

10 **MR. PLACITELLA:** Where you have to look
11 at the totality of the circumstances. And that's why
12 Fellerman says that you can't allow a Court or a
13 litigant to operate under a misimpression of what the
14 truth is.

15 So under New Jersey law it is pretty
16 clear I would submit that you get to look at all of
17 the circumstances in making your decision.

18 And if there is information in the files
19 of either Cahill or BASF that contradicts what they
20 told Courts and litigants, that information should
21 come out regardless of whether at the time it was
22 uttered it was at that point in furtherance of a
23 crime. It may not have been at that point in time.
24 But it was used in furtherance of a crime because --

25 **SPECIAL MASTER:** But isn't your argument

1 that every single step -- taking the argument that
2 you advance, every single step taken here by BASF and
3 Cahill was in furtherance of this coverup?

4 **MR. PLACITELLA:** That's correct.
5 That's our argument.

6 **SPECIAL MASTER:** So why don't you stick
7 with your facts?

8 **MR. PLACITELLA:** And I'm going to lay
9 the facts out. But you asked me is it exactly the
10 same. And I'm saying that just because a statement
11 is made at a time and it could be true and it might
12 have been privileged at that time, if it turns out
13 that that is part of the coverup, then it's in
14 furtherance of the crime. So I think we're saying
15 the same thing.

16 **SPECIAL MASTER:** Well, but I guess --
17 I'm still wondering why you're even arguing it.
18 Because if your argument is that every single
19 statement that was made was made in furtherance of
20 the coverup --

21 **MR. PLACITELLA:** Correct.

22 **SPECIAL MASTER:** -- then why aren't you
23 embracing the in furtherance of standard?

24 **MR. PLACITELLA:** Well, I am not --

25 **SPECIAL MASTER:** I'm sorry. Mr.

1 Pratter?

2 **MR. PRATTER:** Thank you, your Honor. If
3 I may, the other side is arguing it's a more
4 demanding standard. We're saying that the benchmark
5 is as Mr. Placitella has said. And that describes
6 the privilege to be interpreted broadly, not
7 narrowly.

8 **SPECIAL MASTER:** But if it satisfies --

9 **MR. PRATTER:** So it may be, your Honor,
10 that it meets both standard. But the point is if
11 they're saying it's a narrower gate to go through,
12 we're saying no, that's incorrect.

13 **SPECIAL MASTER:** But aren't you also
14 saying that regardless of how narrow that gate is, we
15 get through it?

16 **MR. PRATTER:** Yes.

17 **SPECIAL MASTER:** Okay. I just wanted
18 to make sure that we're arguing about something
19 that's worthwhile arguing about.

20 **MR. ASSAF:** I'm sorry. Did Mr.
21 Placitella say that?

22 **SPECIAL MASTER:** Well, it's just -- Mr.
23 Assaf, you will have your moment.

24 **MR. ASSAF:** Sorry.

25 **SPECIAL MASTER:** Okay. I just want to

Page 100

1 make sure that the plaintiffs get the full
2 opportunity to present whatever it is they want to
3 present.

4 **MR. PRATTER:** What I'm saying, your
5 Honor, is we meet the standard. And if you choose to
6 say where the standard fits, you may think it doesn't
7 make a difference. They say it makes a difference.
8 We don't agree. We also don't agree that their
9 standard applies at this stage of the case in any
10 event.

11 **SPECIAL MASTER:** But regardless, you say
12 even assuming the standard advanced by the
13 defendants, you satisfy it?

14 **MR. PRATTER:** In the search of justice
15 and truth and what this case is all about, we think
16 we meet the standard.

17 **SPECIAL MASTER:** Every case is about the
18 search of justice and truth.

19 **MR. PRATTER:** This one in particular.

20 **SPECIAL MASTER:** Well, this is not
21 special that way, not in my book. They all are.

22 But I will tell what you makes this case
23 special in my book. And that is that at issue is
24 the behavior of a law firm that I would describe as
25 venerable in the practice of law. And to me that's

1 important.

2 I've said to the people in this room,
3 those who have been here before, my view of the legal
4 profession and the high standard that I think it
5 enjoys and should enjoy, so much so as I've actually
6 joked, I married a lawyer, as you did. Mine was 38
7 years ago.

8 **MR. PRATTER:** So was mine.

9 **SPECIAL MASTER:** So I think we're about
10 the same time. Mr. Pratter's wife and I actually
11 did a case together about 25 years ago, representing
12 separate defendants.

13 **MR. PRATTER:** Venerable cuts both ways,
14 your Honor.

15 **SPECIAL MASTER:** Oh, it does. But, you
16 know, it's not every case that alleges that a
17 venerable law firm engaged in a practice that, viewed
18 independently, not in the context of this case, is
19 one that would make everyone in this room cringe.

20 So to that extent this is a different
21 case, at least in my book.

22 **MR. PRATTER:** I agree, it makes it
23 really different.

24 **SPECIAL MASTER:** Okay. Sorry, Mr.
25 Placitella, we went off on a tangent.

1 **MR. PLACITELLA:** Your Honor, to address
2 your question directly, I believe contained within
3 the New Jersey statute is the notion of in
4 furtherance of. But the New Jersey statute is
5 broader. They had the opportunity to adopt that
6 language and they chose not to. It's purposefully
7 been interpreted much more broadly than BASF would
8 have the Court look at it. And that's my point.

9 And in term of what makes this
10 different, this is not a case that is enjoyable for
11 anybody, given the circumstances.

12 **SPECIAL MASTER:** I should hope not.

13 **MR. PLACITELLA:** But it's also about the
14 integrity of our profession and what we do. And in
15 that sense, you know, it's important.

16 And no one relishes these circumstances.
17 No one relishes how we got here. But we're here and
18 we have to work our way through it.

19 And the notion -- and I'll talk about it
20 later -- that this was a rogue law firm and, you
21 know, there was complicity here and the client still
22 has a lot to say about what's happening here. And
23 this notion that somehow the Cahill firm, who
24 deserves for all the good things they've done
25 respect, was just acting on their own, the -- and

Page 103

1 I'll show you that the facts don't bear that out.

2 And I believe that --

3 **SPECIAL MASTER:** Well, is that at all
4 relevant to what is before me?

5 **MR. PLACITELLA:** It is relevant in terms
6 of the allegations by BASF that they and Engelhard --
7 there was no client intent because the -- and they
8 try to lay off client intent on Cahill Gordon.

9 But the facts show that there was in
10 fact client intent. And we can talk about that.

11 **SPECIAL MASTER:** Well, the argument
12 about client intent is under exception (2)(c), not
13 under (2)(a). You're talking about (2)(a).

14 **MR. PLACITELLA:** Right.

15 **SPECIAL MASTER:** And not to tip my hand
16 too much, but I will tell you I don't find the
17 argument on behalf of finding an exception under
18 (2)(c) to be terribly persuasive.

19 **MR. PLACITELLA:** I understand. So we
20 get back to -- so what's the standard? We're not
21 required to prove that we can win the case. We're
22 not required to prove under the Third Circuit law
23 it's more likely than not.

24 I think it does matter or that you
25 should consider that Superior Court Judges, an

1 Appellate Division Judge, and a former Supreme Court
2 Justice have found a prima facie case. Without
3 getting to that record, it's just information in
4 terms of --

5 **SPECIAL MASTER:** None of which --

6 **MR. PLACITELLA:** -- this not in a
7 vacuum.

8 **SPECIAL MASTER:** None of which is final.
9 All of which is actually before the Appellate
10 Division on a mandatory order from the Supreme Court
11 that they consider it on an interlocutory basis.

12 So I don't know what I'm supposed to get
13 from what you just said, except for the fact that
14 this has been litigated, but the results are not
15 final.

16 **MR. PLACITELLA:** No. Judge Litner
17 looked at this on a prima facie basis in a different
18 case and found just from looking -- you know, that
19 there was a prima facie case. I'm not going to get
20 into more that.

21 **SPECIAL MASTER:** But where did that get
22 anybody? Because what happened with that case?

23 **MR. PLACITELLA:** The case ultimately
24 resolved.

25 **SPECIAL MASTER:** Okay. So we have a

1 retired Appellate Division Judge who sat as special
2 master in a case, and there he is, who rendered a
3 report and recommendation to a Superior Court Judge
4 that went nowhere.

5 I don't know what I'm supposed to do
6 with that.

7 **MR. PLACITELLA:** You're here to make
8 your own independent judgment, I understand that.

9 **SPECIAL MASTER:** Okay.

10 **MR. PLACITELLA:** My point is that
11 everyone who's looked at the records at least have
12 found a prima facie case in New Jersey.

13 **SPECIAL MASTER:** I will tell you a Judge
14 Litner story parenthetically. Judge Litner, when he
15 was on the Appellate Division, would do most of his
16 writing at home. And he has two very small dogs.
17 And he took great pride in the fact that he would
18 write with the dogs on his lap because he claimed
19 they helped him write his opinions and that they made
20 the opinions better.

21 And when he explained that to someone,
22 the response that he got was: You need more dogs.

23 So I don't know how many dogs that
24 special master report applied, so I can't really
25 judge it.

1 **MR. PLACITELLA:** Well, I can tell you
2 when I read it, I didn't see any evidence of Alpo or
3 anything else.

4 **SPECIAL MASTER:** Okay.

5 **MR. PLACITELLA:** So I'm assuming that he
6 took the time and came to his own conclusions.

7 **SPECIAL MASTER:** He's an excellent
8 judge.

9 **MR. PLACITELLA:** Right. I think it's
10 worth pointing out that Judge Linares in this case
11 found in fact that BASF had a duty to preserve the
12 evidence.

13 **SPECIAL MASTER:** Every party has a duty
14 to preserve evidence.

15 **MR. PLACITELLA:** Right. Well, there was
16 some debate as to that. But it's no longer a debate
17 in this case.

18 **SPECIAL MASTER:** Not as far as I'm
19 concerned.

20 **MR. PLACITELLA:** Okay. Now, so BASF in
21 its brief makes a number of points. I want to
22 address a couple of them early on and then I'll
23 address the rest during the course of argument.

24 And essentially they make six points In
25 their brief.

Page 107

1 One of the points they make, and it's a
2 significant point in their brief, is they say that
3 our papers were faulty because we did not identify --

4 **SPECIAL MASTER:** Mr. Placitella, I don't
5 want to cut you short, but I think, at least by my
6 introduction to this, you know that I've read
7 everybody's papers. I know what their arguments are.

8 **MR. PLACITELLA:** Okay.

9 **SPECIAL MASTER:** So can you guide
10 yourself accordingly.

11 **MR. PLACITELLA:** Sure. Absolutely.

12 **SPECIAL MASTER:** Thank you.

13 **MR. PLACITELLA:** So the one issue is we
14 believe that based on the public record itself that
15 we have established a prima facie case of crime
16 fraud.

17 The Court, however, under the law is
18 still permitted if it so chooses to look at the
19 withheld documents as part of its decision in making
20 that determination.

21 **SPECIAL MASTER:** But typically isn't it
22 really a two step process? Isn't it first a
23 determination by a preponderance of the evidence that
24 in fact that there was a good faith belief that the
25 exception would apply? And that's got to be by a

1 prima facie showing. And then it's only then that
2 the in camera ex parte examination is to occur?

3 The obligation to disclose even on a
4 limited basis solely to the Court does not ripen
5 until there's been a showing by a preponderance of
6 the evidence that there is a good faith belief that
7 the exception applies.

8 That's language, by the way, from your
9 brief.

10 **MR. PLACITELLA:** Right. I actually
11 believe if the ultimate question is, is there a
12 reasonable basis to believe -- to suspect that the
13 privilege-holder -- and you've quoted that before --

14 **SPECIAL MASTER:** Right. But --

15 **MR. PLACITELLA:** -- and then when the
16 Court says --

17 **SPECIAL MASTER:** -- you apply a
18 reasonable basis to a burden of proof. And the
19 burden of proof is preponderance of the evidence.

20 **MR. PLACITELLA:** Well, I don't think
21 that's how --

22 **SPECIAL MASTER:** The answer to that is
23 yes.

24 **MR. PLACITELLA:** Okay. I don't believe
25 that's how it's articulated in the cases. But

Page 109

1 doesn't sound like I'll dissuade you from that.

2 **SPECIAL MASTER:** But a reasonable basis
3 is not a burden of proof. Okay. A burden of proof
4 is either preponderance of the evidence, clear and
5 convincing evidence, beyond a reasonable doubt.
6 That's a burden of proof.

7 And everything that you prove has to
8 satisfy a burden of proof. If what you have to
9 prove is that there is a reasonable basis to believe,
10 the question is how do you have to prove that? To
11 what level do you have to go?

12 And the answer to that is you're
13 subjected to what I think is the lowest level of
14 proof, which is a fair preponderance of the evidence,
15 which means only that it's more likely than not.

16 **MR. PLACITELLA:** Well, I believe that
17 the cases articulate an even lower burden. But
18 taking --

19 **SPECIAL MASTER:** There is no lower
20 burden.

21 **MR. PLACITELLA:** But even taking that
22 burden, I believe that we've more than satisfied
23 that.

24 **SPECIAL MASTER:** Okay.

25 **MR. PLACITELLA:** But what the case law

Page 110

1 does say is that if the Court is not satisfied for
2 some reason that the publicly available information
3 establishes a prima facie case, you can actually look
4 at the documents as part of making that
5 determination.

6 **SPECIAL MASTER:** So you can go to step
7 two to determine whether step one is satisfied.

8 **MR. PLACITELLA:** Yes. It says -- and if
9 you look at In re: Grand Jury, it says that a factual
10 basis adequate to support a good faith belief by a
11 reasonable person that an in camera review may reveal
12 evidence.

13 So you can actually look at the
14 documents if you so choose. We don't think you need
15 to do that. I'm just saying that the law will allow
16 you to do that.

17 We believe that based upon the publicly
18 available information we more than satisfy the prima
19 facie case.

20 And so what is the crime or fraud that
21 we believe? And we've articulated it in detail in
22 our brief, that there was a misrepresentation to
23 courts and litigants that there was no asbestos in
24 the Emtal talc, there was misrepresentations that
25 there was ever any testimony to that effect to courts

Page 111

1 and litigants.

2 And it's not insignificant, but that
3 once dismissals were obtained, those dismissals were
4 used to secure other dismissals as precedent. And
5 courts were told about that. Courts that were in
6 charge of administering justice were purposely
7 misled.

8 Any one of those things I would submit
9 to you is more than enough to satisfy our low burden.
10 But we have a multiple level set of circumstances,
11 any one of which justifies it.

12 And also, because I know we spent a
13 couple minutes on it, the issue of destruction of
14 documents.

15 The issue here today is not whether BASF
16 has reconstructed a record from rocks that people
17 never looked under to try to build up what was once
18 destroyed.

19 One of the issues on crime fraud is was
20 the evidence destroyed or secreted away with intent?
21 That's crime fraud.

22 The whole issue of whether a spoliation
23 claim survives at trial, that's a whole another
24 inquiry. And I'm not going to spend a lot of time on
25 that.

1 In fact, I think the Court has actually
2 invited BASF, if they believe that's the case, to
3 file a motion for summary judgment. And we'll meet
4 it.

5 But the issue here is, for purposes of
6 crime fraud, was evidence either destroyed or
7 secreted away that would give rise to the crime fraud
8 exception? Not whether they've been able to
9 reconstruct evidence many, many years later, which we
10 take great issue with. They take great issue with us
11 on that issue. We take great issue with them.

12 **SPECIAL MASTER:** I'm surprised by that.

13 **MR. PLACITELLA:** But you do not need to
14 get there to make this determination.

15 **SPECIAL MASTER:** Well, yes and no,
16 because evidentiary determinations don't exist in a
17 vacuum. They have to have a context.

18 And the context for your request for the
19 application of the exceptions to the attorney/client
20 privilege is your underlying claim, which is one of
21 fraudulent concealment.

22 And fraudulent concealment under New
23 Jersey law is simply the cause of action for
24 spoliation. That's all it is. It doesn't mean what
25 the two words would normally mean in regular

Page 113

1 parlance. It means spoliation. And if there's been
2 no spoliation, then there is no cause of action. And
3 if there is no cause of action, then there's no basis
4 for the admissibility of the evidence and therefore
5 no reason to apply an exception.

6 **MR. PLACITELLA:** Well, your Honor, I
7 have to tell you that I think that that's a
8 misreading of the law.

9 I think fraudulent concealment includes
10 the issue of spoliation in terms of destruction. But
11 it also includes the issue of having evidence that
12 you withhold. And that's what happened here.

13 **SPECIAL MASTER:** Well, if you withhold
14 and don't make it available, you've spoliated it.

15 **MR. PLACITELLA:** Well, that's exactly
16 right.

17 **SPECIAL MASTER:** Okay. So it's
18 spoliation by another name.

19 **MR. PLACITELLA:** That's exactly right.

20 **SPECIAL MASTER:** Okay. So we can quote,
21 you know, Romeo and Juliet about a rose by any other
22 name, but...

23 **MR. PLACITELLA:** And you have to look at
24 it at the time that the cause of action existed, not
25 if they found it after the fraud was exposed. You

Page 114

1 have to freeze it in time.

2 What happened in 1992? What was
3 available to these plaintiffs? It was spoliated.
4 The information did not exist. They said it did not
5 exist.

6 So we have to also look at who was
7 involved in the fraud. It was Engelhard, Cahill,
8 and BASF.

9 **SPECIAL MASTER:** Well, BASF because it
10 acquired Engelhard, right?

11 **MR. PLACITELLA:** Well, BASF because it
12 not only acquired Engelhard but continued the exact
13 same conduct after it acquired Engelhard. And I
14 will demonstrate that to you.

15 **SPECIAL MASTER:** Remind me, when did
16 they acquire Engelhard?

17 **MR. PLACITELLA:** 2006.

18 **MR. COREN:** June 2006, your Honor, was
19 the closing.

20 **MR. PLACITELLA:** And the same thing
21 occurred all the way up until 2009 when it was
22 exposed in a New Jersey court. And had it not been
23 exposed, it would still be going on. And that was
24 long after BASF took over Engelhard.

25 So we're going to talk about what

Page 115

1 misrepresentations were made. The
2 misrepresentations, and I think it's significant, did
3 not start in litigation. And it goes to what the
4 root of all this was and what the intent was. The
5 misrepresentations started soon after Engelhard took
6 over the Johnson mine.

7 **SPECIAL MASTER:** And that occurred when?

8 **MR. PLACITELLA:** In early 1970s.

9 **SPECIAL MASTER:** Okay.

10 **MR. PLACITELLA:** So in 1967 they buy the
11 mine. From the 1970s into the 1980s, customers are
12 telling them that they don't want asbestos in their
13 talc.

14 **SPECIAL MASTER:** Can you go back to the
15 prior slide?

16 **MR. PLACITELLA:** Sure.

17 **SPECIAL MASTER:** What's the date of that
18 letter?

19 **MR. PLACITELLA:** 1973.

20 **SPECIAL MASTER:** Okay. It's hard to
21 tell.

22 **MR. PLACITELLA:** 1973. And there are
23 numerous examples of this. I just put up a few. I'm
24 happy to give them all to the Court if the Court
25 wants it.

Page 116

1 **SPECIAL MASTER:** I thought you did.

2 **MR. PLACITELLA:** Well, there's even more
3 than that. But we figured we were pressing our luck
4 with what we gave you.

5 **SPECIAL MASTER:** That's a kind way of
6 putting it, yes.

7 **MR. PLACITELLA:** So customers, whether
8 they were General Electric, B. F. Goodrich, GAF,
9 throughout this entire time period, because the
10 dangers were known and publicized, were telling
11 Engelhard: We do not want asbestos in this talc. If
12 you're going to sell it, we don't want it. We'll buy
13 it from somebody else.

14 And Engelhard knew that. But what did
15 they say? They told the customers, because they knew
16 what the demands were, that there is no asbestos in
17 the talc. Not only did they say there's no asbestos
18 in the talc, they said there's not even a trace of
19 asbestos in the talc by the most sophisticated
20 scientific evidence available.

21 And they told, as I put up on the slide,
22 entire industries that that was the case in order to
23 secure that.

24 In fact, they told the federal
25 government that. When they filled out their MSDS

Page 117

1 sheets, they attached a technical data sheet that
2 also said to the federal government and anybody who
3 would buy their product there's no trace of asbestos
4 in the talc.

5 **MR. FARRELL:** Mr. Placitella, just to
6 clarify, on that last slide, is that quotation from
7 the document you're showing there.

8 **MR. PLACITELLA:** That's from what's
9 attached to the material safety data sheet.

10 **MR. FARRELL:** So it's not from the
11 document that's on the screen?

12 **MR. PLACITELLA:** It is. It's attached
13 to material safety data sheet.

14 **MR. FARRELL:** Okay.

15 **MR. PLACITELLA:** Okay. So in the face
16 of all that, from the early 19 --

17 **SPECIAL MASTER:** Can I just stop you
18 there for a moment, because according to that prior,
19 it's supposedly Exhibits 7 and 8, which I'd like to
20 look at.

21 **MR. COREN:** Is it 8 and 9?

22 **SPECIAL MASTER:** That's what it says --
23 I'm sorry. 8 and 9. Based on Mr. Farrell's
24 question, I want to take a little bit of a look at
25 the material safety data sheet. Okay. That is not

Page 118

1 Exhibit 8.

2 Exhibit 9, Tab A is a technical data
3 sheet. Tab B is a technical data sheet. The MSDS is
4 Tab C under Exhibit 9. And what you're citing from
5 is the technical data that appears as the third page
6 of the MSDS. But when I look at the Bates numbers on
7 the bottom, they don't seem to be sequential. I
8 can't tell. They're cut off.

9 **MR. PLACITELLA:** They're cut off to me
10 too.

11 **MR. FARRELL:** I've looked at the MSDSs
12 carefully, your Honor, and I don't remember ever
13 seeing that quotation in the MSDS.

14 **SPECIAL MASTER:** Do you have these
15 exhibits handy?

16 **MR. FARRELL:** We're checking it now
17 and --

18 **SPECIAL MASTER:** You're welcome to come
19 over here and take a look, because I think this
20 binder weighs more than you do. So it's easier for
21 you to come here than for me to take it over there.

22 **MR. FARRELL:** I'll take that as a
23 compliment, your Honor.

24 **SPECIAL MASTER:** Here's the MSDS front
25 and back. And then the next page is this. I can't

Page 119

1 foot these --

2 **MR. FARRELL:** They're not sequential.

3 **SPECIAL MASTER:** Well, I don't know if
4 they are. But the language is in the second
5 paragraph here.

6 **MR. FARRELL:** That's correct. But I
7 have not seen a reference to the technical data sheet
8 as an attachment to the MSDS document.

9 **SPECIAL MASTER:** I will tell you I've
10 done MSDSs and I've never attached a technical data
11 sheet to one. But I don't know what other people do.

12 **MR. PLACITELLA:** It's possible, but I'll
13 check, that I misspoke. But I know for a fact that
14 what the customers would get would be the MSDS sheet
15 along with the technical data sheet. Whether it was
16 actually attached or not, I'll have to double-check
17 and let you know.

18 **SPECIAL MASTER:** Okay.

19 **MR. FARRELL:** I think the issue, your
20 Honor, was that Mr. Placitella was saying the
21 government received the technical data sheet.

22 And the point I was raising is that I
23 don't believe that language is in the MSDS. And I
24 don't mean to interrupt his argument.

25 **MR. PLACITELLA:** It's not in the MSDS

Page 120

1 sheet itself. Okay. So during this period of
2 time --

3 **SPECIAL MASTER:** And I did not mean to
4 be rude --

5 **MR. PLACITELLA:** No, no. It's a fair
6 point.

7 **SPECIAL MASTER:** -- this is a pretty big
8 issue and I want to make sure I get it right.

9 **MR. PLACITELLA:** Right. So while the
10 representations are being made to the customers that
11 there's not even a trace of asbestos, there are --
12 and I'm not going to go through all of it, but just
13 to highlight examples, beginning in 1972 their
14 insurance carriers are telling them that they find
15 asbestos.

16 They find it in the waste rock in 1973.
17 They find it in the air samples in 1977. They find
18 multiple forms of asbestos in the Emtal talc. They
19 find tremolite asbestos in 1972.

20 And, again it happens multiple --
21 again, here's another example in 1977. They find
22 chrysotile asbestos.

23 It's significant that they start
24 actually counting the number of fibers. And they're
25 not finding a few fibers. They're finding millions

1 of fibers. And this is in the testing documents
2 that are being generated.

3 And BASF in its papers constantly say:
4 Well, they only found trace amounts.

5 But when you look at the data, that's
6 just not -- that's not factual. What they found
7 was --

8 **SPECIAL MASTER:** How do I make that
9 differentiation? Because all you're pointing out to
10 me is the quintessential one man's floor is another
11 man's ceiling.

12 I don't know, nor have I been given the
13 type of expert information I would need in order to
14 judge whether X number of fibers per million is a
15 good thing or a bad thing or --

16 **MR. PLACITELLA:** And you don't have to
17 make that judgment. What I'm saying to you is --

18 **SPECIAL MASTER:** Well, but if they're
19 making a judgment -- if people who are experienced in
20 the area are making the judgment that based upon what
21 their results are, they can make the representation
22 that there are only trace amounts or no discernible
23 amounts of asbestos in it, I don't know what that
24 means.

25 I will tell you I recently tried a case

Page 122

1 where the expert testified at length that it was
2 highly unlikely that things as alleged by the
3 plaintiff could be so.

4 And of course, plaintiff's lawyer
5 cross-examined this witness, who was a full professor
6 at Texas Tech and the nation's leading expert on
7 blood brain barrier matters, and said: Whoa, you
8 know, you said it was highly unlikely. That doesn't
9 mean it's impossible.

10 And she looked at him and said: No good
11 scientist will ever say that anything is impossible.
12 But when we say it's highly unlikely, that's really
13 what it means.

14 So I don't know what they mean by that.

15 **MR. PLACITELLA:** Yes. And you're right.
16 And we're not debating the science.

17 But what is in the files? The files
18 don't say trace amounts. They don't say -- the
19 files say trace to abundant. Right.

20 They only couched their argument in
21 terms of trace. The files that were withheld say
22 trace to abundant.

23 **SPECIAL MASTER:** But I don't know what
24 abundant means.

25 **MR. PLACITELLA:** It means more than

Page 123

1 trace. And we have Dr. Hemstock's testimony, who
2 was the head scientist, explaining what that means.

3 But the point here is not that we need
4 to engage in a scientific debate at this point.

5 They said there was none, not that there
6 was trace amounts. They said that there were no
7 tests --

8 **SPECIAL MASTER:** But that's my point.
9 My point is can they, consistent with the reports
10 that they have, say, quote, there was none, unquote?

11 **MR. PLACITELLA:** No, they can't.

12 **SPECIAL MASTER:** Okay. That's the
13 gospel according to Mr. Placitella.

14 **MR. PLACITELLA:** No, your Honor --

15 **SPECIAL MASTER:** Tell me someone else,
16 some other authority for that?

17 **MR. PLACITELLA:** Their own scientist
18 when I asked him in a deposition is this a true
19 statement that there was no testing to show asbestos,
20 he said no.

21 When the three scientists were
22 questioned in the Westfall case, they all said they
23 found asbestos in the talc, not below detection
24 levels, not some debatable level.

25 The issue is did they have evidence?

Page 124

1 They said there was no evidence, not that the
2 evidence was unreliable, not that the evidence was
3 sporadic.

4 They made representations to courts and
5 litigants that there was, one, no asbestos in the
6 talc, but even more importantly, two, no evidence of
7 asbestos in the talc.

8 **SPECIAL MASTER:** And I ask you these
9 questions because -- and I'm presaging what
10 defendants are going arguing --

11 **MR. PLACITELLA:** Of course.

12 **SPECIAL MASTER:** -- is that they're
13 basically saying: Our representations were accurate,
14 you know, within the bubble of things that could be
15 said.

16 And I hear you to say that no, they were
17 not accurate because they could never have been
18 accurate given the facts.

19 **MR. PLACITELLA:** Their representations
20 could never have been accurate given the facts as
21 they existed.

22 **SPECIAL MASTER:** Okay.

23 **MR. PLACITELLA:** If they would have
24 said --

25 **SPECIAL MASTER:** I thought that's what I

Page 125

1 said.

2 **MR. PLACITELLA:** If they would have
3 said, you know, there are levels that are below
4 detection but they're there, or there are levels --

5 **SPECIAL MASTER:** Well, if they're below
6 detection, how do they know that they're there?

7 **MR. PLACITELLA:** Well, because it
8 depends on the method you use.

9 If they would have said there are levels
10 but it didn't matter, there weren't health
11 consequences because they were so low, that might
12 have been different.

13 But what they said was there were no
14 results at all. No results at all. And that was
15 not true.

16 **SPECIAL MASTER:** Okay.

17 **MR. PLACITELLA:** And you can't slice it
18 any other way. When they say --

19 **SPECIAL MASTER:** Well, Mr. Assaf is
20 going to do a real hard effort at slicing it. But
21 that's for later.

22 **MR. PLACITELLA:** And it wasn't that it
23 was just Engelhard who did the tests. They had
24 outside laboratories. They had two and three
25 laboratories at a time looking at the same stuff.

Page 126

1 And they said: We found asbestos in the talc. And
2 here they say from trace to abundant.

3 **SPECIAL MASTER:** I still don't know what
4 that means.

5 **MR. PLACITELLA:** That's okay. In 1979
6 they had the same samples looked at by three separate
7 laboratories. And they found asbestos in every
8 sample.

9 Now, so then we get to -- and we talked
10 about this a little earlier. One of the significant
11 misrepresentations in this case, and we'll get there
12 in a second, is that there was never any evidence of
13 asbestos in the mine, because if you could convince
14 somebody that the mine didn't have any asbestos, then
15 there was no reason to get to the product, because
16 the product was the product of what came out of the
17 mine.

18 **SPECIAL MASTER:** There was no other
19 place where asbestos could come into the
20 manufacturing process?

21 **MR. PLACITELLA:** Correct, unless they're
22 going to say it was some contaminant during testing
23 or something.

24 So what they did is they focused their
25 affidavits and their efforts to say that there was no

Page 127

1 asbestos in the mine. But they knew that was not
2 true, because they went to the mine in 1979, the head
3 researcher, Mr. Gale, and they took samples and they
4 brought them back.

5 And what happened was that they wanted
6 to make sure they had the most sophisticated test
7 possible. And what they did was they actually sent
8 them down to Georgia Tech. And then Mr. Gale went to
9 Georgia Tech to use their equipment to make sure he
10 had the most sophisticated information. And they
11 found asbestos in the talc -- in the mine, not in a
12 production sample, but in the mine itself.

13 **SPECIAL MASTER:** You mean in the ore
14 from the mine.

15 **MR. PLACITELLA:** In the ore. In the
16 ore.

17 And it's interesting, because when you
18 look at -- and the documents tell us, what was the
19 purpose of the study that they were conducting?

20 Well, they were actually thinking of at
21 the time expanding the mining operation, building a
22 new mill. So they were down there as part of that
23 process.

24 **MR. ASSAF:** Excuse me, what slide number
25 was that?

Page 128

1 **MR. PLACITELLA:** 5/17/79.

2 **MR. FARRELL:** No, the slide, so I can --

3 **SPECIAL MASTER:** They normally have a
4 number on the bottom.

5 **MR. PLACITELLA:** 47.

6 **MR. ROTH:** 47.

7 **MR. FARRELL:** Thank you.

8 **SPECIAL MASTER:** Okay.

9 **MR. PLACITELLA:** So when they came back,
10 Peter Gale, now we know from his transcript, Glenn
11 Hemstock, Georgia Tech, they all found asbestos in
12 that ore. They all did.

13 **SPECIAL MASTER:** You don't mean those
14 circles to be Venn diagrams, do you?

15 **MR. PLACITELLA:** There you go.

16 **SPECIAL MASTER:** Just asking. I don't
17 want to be literal.

18 **MR. PLACITELLA:** So then they had a
19 meeting. It was right after these results came out
20 in May of '79. And at the meeting they concluded
21 asbestos fiber is present.

22 Now, BASF deposed Mr. Swanson, who was
23 one of the people who worked in the laboratory. And
24 his daughter developed mesothelioma. We discovered
25 this at his deposition. I didn't even know it when

Page 129

1 I was asking the questions, frankly. BASF asked him
2 the questions.

3 And he said: Oh, yeah, there's
4 asbestos -- there was asbestos in that talc.

5 And they said: No, Mr. Swanson, I'm not
6 talking about the other -- I'm talking about the
7 talc.

8 He says: No. I know. It was the
9 talc.

10 How do you know it was the talc?

11 I did -- you know, I was there.

12 And then they asked him: What happened?

13 And he said: Well, once we found the
14 asbestos in the talc, they closed up the mine, and we
15 were told to put all of our stuff outside our door
16 and I never saw it again.

17 And that's what happened.

18 **SPECIAL MASTER:** Put all of our stuff,
19 what does that mean?

20 **MR. PLACITELLA:** All of our testing
21 related to the Emtal talc outside of our door. And
22 it was picked up and we never saw the testing again.

23 **SPECIAL MASTER:** Was that part of the
24 March --

25 **MR. PLACITELLA:** Correct.

1 **SPECIAL MASTER:** -- 7, 1984, document
2 retention and destruction memorandum? Right. And
3 it's interesting because --

4 **SPECIAL MASTER:** The one you call the
5 purge memo?

6 **MR. PLACITELLA:** Yeah.

7 **SPECIAL MASTER:** I like that name. It
8 may not be accurate, but it's catchy.

9 **MR. PLACITELLA:** It's interesting that
10 when Mr. Swanson was asked questions, he did not know
11 the exact date of the memo he got, but he
12 recounted -- he said: I had a memo after we found
13 the asbestos, and the memo told us what to do with
14 the evidence. And I believe that the memo was sent
15 by my boss, Glenn Hemstock, but it was authored by
16 the legal department.

17 And it turns out he was pretty darn
18 accurate that it was sent by his boss. And his boss
19 actually testified under oath that it was authored by
20 the legal department.

21 **SPECIAL MASTER:** Was this the deposition
22 that was taken back in the 80s --

23 **MR. PLACITELLA:** No.

24 **SPECIAL MASTER:** -- or is this the
25 deposition more recently taken where Mr. Hemstock

1 himself was in his 80s --

2 **MR. PLACITELLA:** Correct.

3 **SPECIAL MASTER:** -- and at an assisted
4 living facility?

5 **MR. PLACITELLA:** No, he wasn't at an
6 assisted living facility. He was at a hotel being
7 represented.

8 **SPECIAL MASTER:** He wasn't living in a
9 hotel, was he?

10 **MR. PLACITELLA:** No, your Honor.

11 **SPECIAL MASTER:** Where was he living?

12 **MR. PLACITELLA:** He was living with his
13 wife.

14 **SPECIAL MASTER:** In an assisted living
15 facility, correct?

16 **MR. PLACITELLA:** His health was fine.
17 His wife's health was compromised.

18 **MR. ASSAF:** You are correct, your Honor.

19 **MR. PLACITELLA:** His health --

20 **SPECIAL MASTER:** I did read everything.

21 **MR. PLACITELLA:** He was living --
22 because his wife needed extra care. His health was
23 fine.

24 **SPECIAL MASTER:** Okay.

25 **MR. PLACITELLA:** And if you look at his

1 videotape, you will see that he was pretty spry. He
2 was very well under control.

3 **SPECIAL MASTER:** I should look that
4 good. But I'd rather keep my hair too.

5 **MR. PLACITELLA:** Yeah. We went through
6 with him all the testing. And we actually asked him,
7 because he knows what the testing was, and we went
8 through each document. We said: Okay, was this
9 reliable? Did you rely upon this? Was this
10 reliable? Was it unreliable? We actually asked him
11 to put it in three columns, positive, negative, and
12 tests that he thought there were problems with.

13 They say he was pressured. So I went
14 back and I asked him questions. And I cited to the
15 transcript. When you went through all these tests,
16 and I went through every one all over again, did you
17 feel pressure?

18 And you can look at his videotape if you
19 so choose.

20 And he said: No, you know, I'm good
21 with what I testified with.

22 And I asked him: What did you mean --
23 what did it mean by trace? What did that mean?

24 And he said: Well, trace was in the
25 order of a couple of percent or so.

Page 133

1 So then I asked him: Well, what does
2 that mean in the real world if it's just trace?
3 Forget abundant. If it's just trace, what does that
4 mean in the real world? And I said: So, for
5 example, you know, given the amount of Emtal talc
6 that was sold to the Congoleum plant in Trenton, what
7 did that mean?

8 And he said: Well, you know, and I --
9 using the two percent, it was about 1,000,800 pounds
10 of asbestos over three years inside the talc.

11 **SPECIAL MASTER:** So if the asbestos was
12 one percent of the talc that was being sent out?

13 **MR. PLACITELLA:** It would be half of
14 that.

15 **SPECIAL MASTER:** I'm sorry?

16 **MR. PLACITELLA:** Then it would have been
17 300,000 pounds.

18 **SPECIAL MASTER:** So he used --

19 **MR. PLACITELLA:** He used two percent --

20 **SPECIAL MASTER:** He used two percent.

21 **MR. PLACITELLA:** -- as a trace.

22 **SPECIAL MASTER:** Okay.

23 **MR. PLACITELLA:** And then he took the
24 total poundage -- and I walked through him through
25 this --

Page 134

1 **SPECIAL MASTER:** Of the talc actually
2 sold to Congoleum?

3 **MR. PLACITELLA:** Correct.

4 **SPECIAL MASTER:** And it's just simple
5 arithmetic.

6 **MR. PLACITELLA:** Exactly right. Now, to
7 be fair, I walked him through the calculations. But
8 that's where we got -- just to give it context --

9 **SPECIAL MASTER:** Take it back again.
10 What's the relevance of the red box?

11 **MR. PLACITELLA:** That's just the math.
12 He said it was 1,800 pounds over three years.

13 **SPECIAL MASTER:** It's one million eight.

14 **MR. PLACITELLA:** Right, a million eight
15 over three years. So one year would have been
16 600,000.

17 **SPECIAL MASTER:** Well, there's a
18 difference between 600,000 pounds of asbestos and
19 600,000 pounds of asbestiform material.

20 **MR. PLACITELLA:** No.

21 **SPECIAL MASTER:** No?

22 **MR. PLACITELLA:** There's a difference --

23 **SPECIAL MASTER:** The words have meaning.

24 **MR. PLACITELLA:** There's a -- I'm not
25 sure I'm getting --

Page 135

1 **SPECIAL MASTER:** Asbestos is one thing.
2 Asbestiform is something else.

3 **MR. PLACITELLA:** I don't think that
4 that's an accurate description of the science.

5 **SPECIAL MASTER:** Okay.

6 **MR. PLACITELLA:** But we don't have to --

7 **SPECIAL MASTER:** Yeah, we do. But
8 that's all right.

9 **MR. PLACITELLA:** Okay. So what happens
10 in the face of all this information? A lawsuit is
11 filed by Mr. Westfall. And Engelhard is not
12 originally in the case. They're joined later. But a
13 lawsuit is filed in October of 1982. Significantly,
14 at the same time --

15 **SPECIAL MASTER:** And this is the one in
16 Rhode Island?

17 **MR. PLACITELLA:** Correct.
18 Significantly, at the same time there's -- or close
19 in time there's another lawsuit filed in California
20 called the Schwartz case. And the significance of
21 that will become evident in a couple minutes.

22 In March of '83 Dr. Hemstock testifies
23 that there were tests showing from trace to abundant
24 fibers of asbestos in the talc depending on the test
25 that you looked at. In April of --

Page 136

1 **SPECIAL MASTER:** Don't go too far,
2 because there's a little bit of confusion in respect
3 of that.

4 I thought in your brief you referred to
5 the Hemstock deposition as Exhibit 3. And it's
6 actually Exhibit 4.

7 **MR. PLACITELLA:** Oh.

8 **SPECIAL MASTER:** I just want to make
9 sure that we're clear on that record. It was in a
10 footnote, if memory serves me. Oh, actually it's
11 footnote 4 of your brief where you refer to Exhibit 4
12 as the, quote, Cahill compilation.

13 **MR. PLACITELLA:** That's different.

14 **SPECIAL MASTER:** And in fact, Exhibit 4
15 is the continued deposition of Glenn Hemstock.

16 **MR. PLACITELLA:** Right. The Cahill
17 compilation is different.

18 **SPECIAL MASTER:** Okay. I thought so.

19 **MR. PLACITELLA:** That's Exhibit 3.

20 **SPECIAL MASTER:** And we're all going to
21 blame your son for this mistake. You get a pass on
22 that one.

23 **MR. PLACITELLA:** So first Dr. Hemstock
24 says that the testing showed trace to abundant
25 asbestos, depending on the tests that were done and

Page 137

1 when. Dr. Triglia verifies. Dr. Gale we know
2 now --

3 **SPECIAL MASTER:** It's not Dr. Gale, it's
4 just Mr. Gale, correct?

5 **MR. PLACITELLA:** Mr. Gale. He also
6 says that they found chrysotile fibers. So you have
7 three different scientists all testifying. Then the
8 Westfall case settles.

9 **SPECIAL MASTER:** They do that.

10 **MR. PLACITELLA:** Right. Good for Mr.
11 Westfall.

12 So what happens? As a condition of
13 settlement, all of the information that was
14 accumulated during the case gets turned back over to
15 Engelhard.

16 **SPECIAL MASTER:** That's not unusual.

17 **MR. PLACITELLA:** It's not unusual --

18 **SPECIAL MASTER:** It's not unusual.

19 **MR. PLACITELLA:** -- it's kind of unusual
20 that the depositions get turned back over. But it
21 does happen. And it happened in this case.

22 **SPECIAL MASTER:** I will tell you it
23 happens in pretty much every case I handle. So
24 that's not unusual to me.

25 **MR. PLACITELLA:** All right. So what

Page 138

1 happened? What's turned back over? What's turned
2 back over is all of the scientific testing, all of
3 the depositions, all of the exhibits to the
4 depositions, and more than that, all of the evidence
5 that the plaintiff had amassed independently, which
6 is unusual.

7 So for example, they had a Dr. Glassley,
8 who was a geologist. They hired him. Dr. Glassley
9 went up to the mine.

10 **SPECIAL MASTER:** You mean Westfall did?

11 **MR. PLACITELLA:** Correct. Dr. Glassley
12 went up to the mine. Dr. Glassley, because he
13 couldn't get into the mine itself, took samples right
14 out on the side of the mine, the waste samples, and
15 he did testing. And he was prepared to testify that
16 he found chrysotile asbestos in that mine.

17 And what he did is he had scientific
18 data. He took photographs under the microscope. He
19 took notes. He had samples. That Westfall was
20 forced to turn over to Engelhard.

21 **SPECIAL MASTER:** Well, he wasn't forced
22 to turn over. He agreed to turn it over as part his
23 settlement. Nobody put a gun to his head, did they?

24 **MR. PLACITELLA:** Well, okay.

25 **SPECIAL MASTER:** He had the option to

Page 139

1 say no.

2 **MR. PLACITELLA:** He did have the option
3 to say no.

4 **SPECIAL MASTER:** Okay.

5 **MR. PLACITELLA:** So what happened to Dr.
6 Glassley's material? Right. Dr. Glassley's
7 evidence was destroyed. Right. It wasn't preserved
8 at this point in time. They destroyed his samples.
9 They destroyed his notes. They destroyed all of his
10 findings.

11 **SPECIAL MASTER:** How do we know that?

12 **MR. PLACITELLA:** Because they admitted
13 it in their request for admissions. And we know
14 that they did that. And that's not usual. Okay.

15 And the only thing that Dr. Glassley
16 kept was he had a field notebook and some notes of
17 his own because it pertained to other work that he
18 did.

19 But the work that he turned over to
20 Westfall was destroyed.

21 **SPECIAL MASTER:** Pursuant to a
22 stipulation.

23 **MR. PLACITELLA:** Pursuant to their
24 agreement. Now, that becomes material because that
25 same evidence in some other form surfaces 20 years

Page 140

1 later. And we'll talk about that in a little bit.

2 It becomes significant in terms of what happens here.

3 So some months later --

4 **SPECIAL MASTER:** I'm looking at my watch
5 because you told me --

6 **MR. PLACITELLA:** I know that.

7 **SPECIAL MASTER:** -- you have a hard stop
8 at 3:30.

9 **MR. PLACITELLA:** I'm going to try move
10 through this quickly now.

11 **SPECIAL MASTER:** Okay. And I apologize
12 if I'm eating up your time.

13 **MR. PLACITELLA:** That's okay. Some
14 months later -- it settles in the fall. And some
15 months later the purge memo is sent out over Dr.
16 Hemstock's name. And that purge memo, calling for
17 they say the return of the information, that whole
18 process is going on and the Glassley evidence is
19 destroyed. It's material evidence. It shows
20 asbestos in the mine. That all is going on while the
21 Schwartz case is still pending.

22 So the process of gathering up the
23 evidence, the process of destroying the Glassley
24 samples and the Glassley notes, that all is happening
25 while there's another case pending in California.

Page 141

1 **SPECIAL MASTER:** To be fair with you,
2 because you are talking about the purge memo, I don't
3 read it the way you do. I just want you to know
4 that.

5 What I find most telling about the purge
6 memo, and I'm using that term because that's what you
7 called it, is the last full sentence in the substance
8 of it, which says: Please understand that it is our
9 intent to retain copies of those documents to be
10 preserved from discontinued operations only in our
11 central files and can be accessed there should the
12 need arise.

13 **MR. PLACITELLA:** Yes, that's what it
14 says. I absolutely agree. That's not what happened
15 though.

16 **SPECIAL MASTER:** Well, but it's not a
17 purge memo. It is a document retention memo. And
18 no different than what any number of companies were
19 doing in the early 1980s when all of a sudden there
20 was this explosion of information and you simply
21 couldn't keep the information any longer. Everybody
22 started adopting document retention and destruction
23 policies.

24 **MR. PLACITELLA:** I understand. But what
25 we'll demonstrate to you happened -- and by the way,

Page 142

1 this only proves the point about fraudulent
2 representation, because by their own memo they gather
3 all of the information in one place.

4 So even if that's true, and we don't
5 believe it was true, because we'll -- and I'll show
6 you why. But even if that was true and that's what
7 they did, that only proves that they had the evidence
8 in their possession at a time when they were making
9 representations that the evidence did not exist.

10 So the purge memo is sent. Dr.
11 Hemstock testifies in the Samson case that it went
12 out under his name but it was authored by Mr.
13 Dornbusch.

14 So now the Schwartz case settles in
15 July. And then some time passes. And then
16 litigation starts anew.

17 And one of the things that happens --
18 and I'm not going to go into this in great detail
19 because you've read it. I just want to put some
20 things in context.

21 They hire -- they get together with
22 Johnson & Johnson and they construct this affidavit.
23 And the affidavit says, one, there's no asbestos in
24 Vermont, which we know is not true, but that the
25 Johnson mine itself is free from contamination by

1 asbestos.

2 And what's significant here is that --

3 **SPECIAL MASTER:** And that affidavit was
4 submitted in which case?

5 **MR. PLACITELLA:** It was submitted in
6 hundreds, if not thousands of cases over and over and
7 over.

8 And what's significant in that
9 affidavit, and they do cite two articles that --

10 **SPECIAL MASTER:** Just so that I know,
11 your referring to the Ashton affidavit?

12 **MR. PLACITELLA:** Correct. The Ashton
13 affidavit contains of a number of things. It
14 contains published articles that do draw the
15 conclusion that there was no asbestos in the mine.

16 If you look at -- we don't really have
17 to go there, but if you actually look at the
18 articles, you see the sampling that was done was done
19 in the 40s and 50s when they're at a different level.
20 But we don't have to go there.

21 But one of the significant pieces of the
22 affidavit is they attach as proof that there was no
23 asbestos in the mine the deposition testimony of Mr.
24 Chidester, who was their expert in the Westfall case.

25 So they clearly, both Johnson & Johnson

Page 144

1 and Engelhard, are referencing the Westfall case and
2 they're attaching sworn testimony from the Westfall
3 case.

4 **SPECIAL MASTER:** They're referencing Dr.
5 Chidester's testimony --

6 **MR. PLACITELLA:** Correct.

7 **SPECIAL MASTER:** -- that could have been
8 given in any case.

9 **MR. PLACITELLA:** No, your Honor. They
10 attached the Westfall transcript.

11 **SPECIAL MASTER:** I understand that. But
12 it could have been in any case. I don't think that
13 the plaintiff would have made any difference to what
14 Dr. Chidester said, would it?

15 **MR. PLACITELLA:** No, that's not my
16 point. My point is that they took the testimony from
17 the Westfall case for Chidester knowing full well
18 that their own scientists provided testimony that was
19 exactly the opposite. And that was not part of the
20 affidavit.

21 If the affidavit was going to be
22 truthful, it would have said: This is my opinion,
23 this is what Dr. Chidester said, and, oh, by the way,
24 there were tests but they were either unreliable or
25 they only showed trace, and by the way, our own

1 expert -- our own scientists also testified and you
2 should look at that and then you make your
3 determination what you're going do with that
4 information.

5 They didn't do that. They knew it was
6 there.

7 **SPECIAL MASTER:** Wouldn't they have been
8 entitled to decide what they wanted to rely upon on
9 the basis of credibility? Maybe they thought Dr.
10 Chidester was more credible than their own people. I
11 don't know that.

12 **MR. PLACITELLA:** Well, they used Dr.
13 Ashton's affidavit to say there was no evidence. It
14 did not contain asbestos. That just wasn't true.
15 At most it was misleading.

16 In fact, I asked Dr. -- and I'll show
17 you the testimony. I asked Dr. Hemstock himself
18 whether the affidavit was truthful. He said no.

19 **SPECIAL MASTER:** Well, of course he's
20 going to say no. At least that's consistent with
21 what he had said before. Whether it's right or not
22 is a different story. But it is consistent.

23 **MR. PLACITELLA:** Then in order to
24 buttress that claim, they go to Mr. Carter. And
25 they have Mr. Carter execute an affidavit. And they

Page 146

1 have Mr. Carter kind of seal the deal.

2 While Mr. Dr. Ashton talks about his
3 opinions, Mr. Carter then comes forward and says:
4 And there is nothing else to look at. Right. We
5 don't have any other testing data. That's his
6 affidavit.

7 Now, if you take the purge memo at its
8 face, of course they had the data. If you take the
9 Cahill compilation which they found in Mr.
10 Dornbusch's own personal file, of course they had the
11 data.

12 But they had Mr. Carter execute an
13 affidavit saying that they don't have any testing
14 data.

15 So they used both the Carter affidavit
16 and the Dornbusch affidavit in conjunction the Ashton
17 affidavit together to convince claimants, courts, and
18 litigants that there was no merit to them going
19 forward with their case.

20 And we put in our brief a few examples
21 of the letters that were sent. We can give you all
22 the examples if you really want to see them. There
23 are many, many, many examples.

24 **SPECIAL MASTER:** Do I look like I want
25 you to give me more paper?

Page 147

1 **MR. PLACITELLA:** No.

2 **SPECIAL MASTER:** Okay.

3 **MR. PLACITELLA:** They did it in
4 virtually every state from Michigan to Arkansas to
5 Massachusetts. They did it to me. In 2009 they
6 sent us the same letter and they threatened us with
7 sanctions.

8 **SPECIAL MASTER:** Well, did they do it to
9 you or to your wife?

10 **MR. PLACITELLA:** Well, to my wife. But
11 I always take the brunt of it.

12 **SPECIAL MASTER:** Well, as it should be.

13 **MR. PLACITELLA:** As it should be.

14 **SPECIAL MASTER:** But I recall reading
15 that letter. And it was not addressed to you.

16 **MR. PLACITELLA:** Right. It was
17 addressed to her. But in my house we're the same.
18 So I'm saying that on the record for points.

19 **SPECIAL MASTER:** No, I'm going to use
20 that to blackmail you, because in my house my wife
21 and I are not the same.

22 **MR. PLACITELLA:** So this is 2009, three
23 years after BASF takes over Engelhard.

24 And they didn't just put it in letters,
25 your Honor. They put it in sworn answers to

Page 148

1 interrogatories. They did it in the Chernick case,
2 which is a representative of the plaintiffs in this
3 case. In the Chernick case, not only did they say
4 that there was no asbestos in the talc, they said
5 nobody ever testified, there was no prior testimony.
6 That was just not true.

7 **SPECIAL MASTER:** Correct me if I'm
8 wrong, the Chernick case in New York is still going
9 on?

10 **MR. PLACITELLA:** Correct. But Engelhard
11 is out of it -- or BASF is out of it.

12 **SPECIAL MASTER:** How is BASF out of it?

13 **MR. PLACITELLA:** They were dismissed
14 under the representation -- they filed a motion for
15 summary judgment and it was not opposed. In the
16 motion for summary judgment they said there was no
17 asbestos in the talc.

18 **MR. FARRELL:** And then withdrawn.

19 **SPECIAL MASTER:** Have you filed a motion
20 to vacate the summary judgment?

21 **MR. FARRELL:** I do not represent Mrs.
22 Chernick in that case. I represent Mrs. Chernick in
23 this case, in the fraudulent concealment case.

24 **SPECIAL MASTER:** Are you in
25 communication with her counsel in that case?

Page 149

1 **MR. PLACITELLA:** Yes, I am.

2 **SPECIAL MASTER:** What's the status of
3 the claim against BASF? Has it been reinstated?

4 **MR. PLACITELLA:** To my knowledge no.
5 To my knowledge no.

6 **SPECIAL MASTER:** I'm sure you'll tell
7 me. You'll write it on one of your little note
8 pieces and you'll tell me.

9 **MR. PLACITELLA:** Somebody told me they
10 thought the case was stayed. But we can check and
11 let you know.

12 **SPECIAL MASTER:** Okay. Mr. Assaf is
13 going to have a coronary if I don't let him speak,
14 so...

15 **MR. ASSAF:** I was going to say I think
16 Mr. Placitella was mistaken. It is stayed. I can
17 get --

18 **SPECIAL MASTER:** The case against BASF
19 is stayed or the entire the case?

20 **MR. ASSAF:** The insurance case is still
21 pending in New York and it is stayed.

22 **SPECIAL MASTER:** What's the status of
23 BASF in that case as stayed?

24 **MR. ASSAF:** We're --

25 **SPECIAL MASTER:** Are you still a party

Page 150

1 defendant?

2 **MR. ASSAF:** Still a party defendant.

3 **SPECIAL MASTER:** So you have not been
4 dismissed?

5 **MR. ASSAF:** Not to my knowledge, your
6 Honor. And I'll check that. If I'm wrong, I'll
7 confirm with you on Monday. But to my knowledge
8 we're still in it. Every once in a while we receive
9 a communication from the Court.

10 **SPECIAL MASTER:** Okay.

11 **MR. PLACITELLA:** They filed
12 interrogatory responses in the federal MDL saying the
13 same thing.

14 **SPECIAL MASTER:** That's the one before
15 Judge Weiner?

16 **MR. PLACITELLA:** Correct. And that
17 applied to every federal case across the United
18 States.

19 They filed the same interrogatory
20 answers or similar citing the Ashton affidavit in the
21 Graham case here. They filed it in the Ohio
22 interrogatory cases. There's a general set of
23 interrogatories in Ohio. And they --

24 **SPECIAL MASTER:** And that's five of the
25 six representative plaintiffs in this case?

1 **MR. PLACITELLA:** Correct. And then
2 they made the representations not only to the
3 litigants but to the Courts. They wrote a letter to
4 Judge Weiner representing that there was no asbestos
5 in the talc, citing to the Ashton affidavit.

6 **MR. FARRELL:** Can you go back, please?

7 **MR. PLACITELLA:** Sure.

8 **MR. FARRELL:** Thank you.

9 **MR. PLACITELLA:** Okay. There were
10 summary judgment motions filed in Ohio making the
11 representation. There was a summary judgment motion
12 filed in the Graham case making the representation.
13 There were summary judgment motions filed in
14 Massachusetts making the representation.

15 And then I asked the witnesses in
16 deposition. I said, for example to Dr. Hemstock,
17 when I asked him about the Ashton affidavit: From
18 everything you know, is that accurate?

19 He said no.

20 I asked their corporate representative,
21 Ellen Poole, about the Ashton affidavit: Based on
22 everything that we've gone through and all the tests
23 you're aware of, is that a true statement?

24 And she said: No, there were tests that
25 showed there was asbestos.

Page 152

1 **SPECIAL MASTER:** She didn't say no. She
2 said there were tests that showed, right?

3 **MR. PLACITELLA:** There were tests that
4 showed there was contamination by asbestos. That's
5 what it says.

6 When I asked him about the Carter
7 affidavit, Dr. Hemstock, he said -- I asked him: Is
8 that a true statement?

9 And he said: I don't know what was in
10 Mr. Carter's mind at the time, but it appears not to
11 be true on the surface of it, on the face of it.

12 And then there are numerous admissions
13 by Engelhard and BASF that the lies they told
14 actually worked.

15 And we have some examples. I didn't
16 want to overburden the Court with all of the
17 examples. If you want them, we'll supply them to you
18 for a complete record.

19 But there are many, many statements by
20 counsel that clearly state that all the cases in this
21 state were dismissed because of our representation,
22 all the cases in that state were dismissed based on
23 that representation.

24 They did it to Mr. Bevan. There's
25 actually testimony where they admit Mr. Bevan

Page 153

1 dismissed his cases based upon that representation.

2 They actually went so far in one Ohio
3 case to say, when they were trying to convince the
4 lawyer to dismiss his cases, he said: Look, what are
5 you doing? Virtually everybody else who we've told
6 this to has dismissed their cases. And --

7 **SPECIAL MASTER:** Before you go any
8 further, Mr. Placitella, a couple of times you've
9 said there's more that we could submit to you.

10 **MR. PLACITELLA:** Right.

11 **SPECIAL MASTER:** And I rather tongue in
12 cheek said: Do I look like I need more paper from
13 you?

14 Actually that's not the standard. The
15 standard is you should submit whatever you think you
16 need to submit to advance your cause. As you know, I
17 will review everything that you submit. It's a
18 little late in the day to be doing that.

19 **MR. PLACITELLA:** Right.

20 **SPECIAL MASTER:** And if you do, it's
21 going to trigger an opportunity by BASF to respond.

22 **MR. PLACITELLA:** I understand.

23 **SPECIAL MASTER:** So bear that in mind.
24 Well, actually BASF and Cahill, because they both
25 opposed your application.

Page 154

1 **MR. PLACITELLA:** Well, we put a lot in
2 the record, your Honor. We believe you can make it
3 based on what we've given you. We tried to be
4 judicious in how much we were going to give you, but
5 there's a lot more where that came from. And I'm
6 making that representation because I've read it. I
7 asked the representative for BASF, the corporate
8 representative --

9 **SPECIAL MASTER:** What is Miss Poole's
10 position with BASF?

11 **MR. PLACITELLA:** She was the corporate
12 representative.

13 **SPECIAL MASTER:** I know she appeared at
14 a deposition as a 30(b)(6) deponent.

15 **MR. PLACITELLA:** She no longer works for
16 them.

17 **SPECIAL MASTER:** What was her position
18 at BASF?

19 **MR. PLACITELLA:** She no longer works for
20 them. As I understand it, she works -- she's not
21 with them anymore.

22 **SPECIAL MASTER:** At the time that her
23 deposition was taken --

24 **MR. PLACITELLA:** I think she worked in
25 the accounting department.

Page 155

1 **SPECIAL MASTER:** Okay. So she was not
2 a lawyer?

3 **MR. PLACITELLA:** Correct.

4 **SPECIAL MASTER:** But she was designated
5 by BASF as their 30(b)(6) representative?

6 **MR. PLACITELLA:** That's correct.

7 **SPECIAL MASTER:** Okay. So her knowledge
8 would be on the accounting side. She's not a
9 scientist.

10 **MR. PLACITELLA:** Right. Her personal
11 knowledge, that's correct.

12 And so we went through the documents and
13 she admitted that, you know, those were the
14 representations. And based on those representations,
15 cases were dismissed all over the United States.

16 **SPECIAL MASTER:** And that's you showing
17 her documents and asking her: Is this what it says
18 and what was the result of it?

19 **MR. PLACITELLA:** Correct. So then what
20 happens, in 2004 to 2006 there's another case filed
21 in Rhode Island. It's called the Martin case. And
22 in the Martin case somehow the plaintiff's lawyer
23 found out about the Westfall case.

24 Maybe they knew each other from town.
25 Who knows? We'll find out.

Page 156

1 **SPECIAL MASTER:** Rhode Island is a small
2 place.

3 **MR. PLACITELLA:** Rhode Island is a small
4 place. And I think the offices aren't far away from
5 each other.

6 So what happens is that the lawyer,
7 Elizabeth Quizone (phonetic), tracks down Mr.
8 Glassley and she hires Dr. Glassley. And somehow she
9 gets her hands on some of the Hemstock -- I'm sorry,
10 some of the Westfall --

11 **SPECIAL MASTER:** Westfall.

12 **MR. PLACITELLA:** -- evidence. And he
13 has some other notes of his own I believe.

14 So they piece things together with
15 what's left. And Glassley is going to testify about
16 what he found when he went there.

17 And it's documented in answers to
18 interrogatories. And his deposition was actually
19 taken in a New Jersey state court case. And he says:
20 If I was asked in the Martin case, I would have
21 testified that there was asbestos in the talc.

22 **SPECIAL MASTER:** What happened to the
23 Martin case that he didn't testify?

24 **MR. PLACITELLA:** The Martin case -- once
25 Dr. Glassley surfaced, the Martin case was settled.

Page 157

1 But the interesting thing about the
2 Martin case was that now the whole issue of the
3 Westfall case resurfaces.

4 And you can even look on the privilege
5 log where there's references to the Westfall case
6 during the time that the Martin case is pending. So
7 the whole issue --

8 **SPECIAL MASTER:** Help me foot this to
9 the information you provided. I don't recall seeing
10 anything in respect to the Martin case in your
11 submissions. Am I missing something?

12 **MR. PLACITELLA:** Appendix E Jared says.

13 **SPECIAL MASTER:** So the 44 page
14 spoliation appendix.

15 **MR. JARED PLACITELLA:** Yes, your Honor.

16 **SPECIAL MASTER:** No wonder I don't
17 remember it.

18 **MR. PLACITELLA:** So what happens here is
19 that the case is settled. And what happened in
20 Martin is Dr. Glassley actually authored a report and
21 that was -- and as a condition of settlement that
22 report was turned back over to Engelhard and to
23 Cahill Gordon.

24 **SPECIAL MASTER:** Well, by this point
25 isn't it BASF?

Page 158

1 **MR. PLACITELLA:** I think BASF is right
2 in the crevice. I don't think it's BASF quite yet.

3 **SPECIAL MASTER:** Okay.

4 **MR. PLACITELLA:** If I get the timing
5 right.

6 **SPECIAL MASTER:** Well, BASF acquired
7 Engelhard in 2006.

8 **MR. PLACITELLA:** 2006. But I think --
9 I'm not positive on that issue.

10 But what's significant here is that the
11 actual report now is in issue.

12 **SPECIAL MASTER:** Apparently somebody has
13 it, because --

14 **MR. PLACITELLA:** Well, what happened to
15 it? What happened was BASF and Cahill Gordon put it
16 on their privilege log.

17 So they took the plaintiff's expert
18 report that found asbestos in the talc that had
19 resurfaced in the Martin case, and then they put it
20 on their privilege log and they called it work
21 product. And they described it on their privilege
22 log as summary of activities related to services
23 rendered. Now, we only know that from everything
24 that's transpired.

25 No plaintiff's lawyer or anybody else

Page 159

1 who got that privilege log was ever going to know
2 that summary of related services rendered was
3 actually a plaintiff's expert report.

4 **SPECIAL MASTER:** How did you know it?
5 How did you know it?

6 **MR. PLACITELLA:** I eventually found out.

7 **SPECIAL MASTER:** How?

8 **MR. JARED PLACITELLA:** We got the
9 report.

10 **MR. PLACITELLA:** We eventually -- we now
11 have the report.

12 **SPECIAL MASTER:** Okay. How?

13 **MR. PLACITELLA:** They de-privileged it
14 after a battle.

15 **SPECIAL MASTER:** Okay.

16 **MR. PLACITELLA:** I don't want to say
17 more than that. It was de-privileged at some point
18 in time.

19 **SPECIAL MASTER:** You mean it was --

20 **MR. PLACITELLA:** In 2009 --

21 **SPECIAL MASTER:** -- taken off the
22 privilege list by BASF --

23 **MR. PLACITELLA:** Correct.

24 **SPECIAL MASTER:** -- and handed to you?

25 **MR. PLACITELLA:** Correct.

Page 160

1 **SPECIAL MASTER:** Okay.

2 **MR. PLACITELLA:** All right. That was
3 post-2009. So between 2006 up until the Paduano
4 case, even though they had a report from the
5 plaintiff's expert saying there was asbestos in the
6 talc, people were still being told there was no
7 evidence of asbestos in the talc. People were still
8 being told it appeared on a privilege log.

9 They had no right to put that on a
10 privilege log as their work product. That wasn't
11 described accurately.

12 **SPECIAL MASTER:** But you got it. And
13 you did get it before March of 2011.

14 **MR. PLACITELLA:** We got it.

15 **SPECIAL MASTER:** Before March of 2011.

16 **MR. PLACITELLA:** Yes. But in terms of
17 fraud, this clearly demonstrates from our perspective
18 ongoing fraud. They had it. It was there. It
19 came up. They settled the case. They buried the
20 evidence and they put it on the privilege log. And
21 they put it on the privilege log so no one would ever
22 figure it out. And no one did figure it out.

23 **SPECIAL MASTER:** How did you figure it
24 out?

25 **MR. FARRELL:** Would you like me to speak

Page 161

1 to that?

2 **MR. PLACITELLA:** I'm concerned about how
3 much I'm allowed to say.

4 **MR. FARRELL:** I'd be happy to address
5 it, your Honor, because I don't think that --

6 **SPECIAL MASTER:** Mr. Farrell, I'm dying
7 to hear this answer.

8 **MR. FARRELL:** Thank you, your Honor.

9 The privilege log that Mr. Placitella is
10 showing you is a privilege log that was created in
11 the Paduano case after the Littleton Joyce law firm
12 went through the files of Cahill Gordon to try to
13 identify documents that were responsive to the
14 fraudulent concealment discovery Mr. Placitella was
15 taking in that case.

16 They found in Cahill Gordon's files a
17 copy of a document titled summary of activities
18 related to a case, which they initially thought was a
19 consulting expert or draft report prepared by an
20 expert for the defense. So they put it on the
21 privilege log believing it was a defense privileged
22 item. Once we learned --

23 **SPECIAL MASTER:** Let me stop you right
24 there. The title of the document is exactly the
25 language that appears in the privilege log?

Page 162

1 Can you put that back up, please?

2 **MR. FARRELL:** It's longer than that.

3 **MR. PLACITELLA:** That's the document.

4 **SPECIAL MASTER:** Well, can you put up
5 the privilege log, please?

6 The language that it says there, summary
7 of activities related to services rendered, does that
8 come from the title of the document itself?

9 **MR. FARRELL:** I believe so, yes.

10 **MR. PLACITELLA:** Here's the title, your
11 Honor.

12 **SPECIAL MASTER:** Well, I can't read
13 that.

14 **MR. PLACITELLA:** I'll read it to you.

15 **SPECIAL MASTER:** Okay.

16 **MR. PLACITELLA:** Summary of activities
17 related to services rendered for Decof & Grimm in the
18 case of David L. Westfall versus Whittaker, Clark &
19 Daniels.

20 Anybody who would see Decof & Grimm,
21 they would come to a different conclusion. That was
22 left out.

23 **SPECIAL MASTER:** Only if they know who
24 Decof & Grimm are. And I don't.

25 **MR. FARRELL:** That was exactly the point

Page 163

1 I was going to make, your Honor. It was thought to
2 be a report prepared for the defendants. When we
3 learned that Decof & Grimm and Mr. Glassley were
4 actually the experts --

5 **SPECIAL MASTER:** On the other side.

6 **MR. FARRELL:** -- for the plaintiff, we
7 took the document off of the privilege log and
8 produced it to Mr. Placitella.

9 So any suggestion that this was a fraud
10 or effort to conceal something is simply untrue.

11 **SPECIAL MASTER:** Okay. And in fact the
12 designation on the privilege log is just verbatim the
13 first X number of words in the title of the document.

14 **MR. FARRELL:** That is correct. And to
15 the extent the argument is that this was done in
16 multiple cases or something, I believe this is the
17 only instance of it occurring. And since that time
18 it has not appeared on any privilege log.

19 **SPECIAL MASTER:** Okay. All right.
20 We've gotten to the bottom of that mystery.

21 **MR. PLACITELLA:** Your Honor, all you
22 have to do is read the report and you'll know -- you
23 can't mistake that this was a defense report. I'm
24 happy for you to read the whole thing.

25 And Decof & Grimm was not Cahill Gordon.

Page 164

1 Decof & Grimm was not the local defense lawyer. This
2 was no coincidence.

3 **SPECIAL MASTER:** Well, I don't know
4 that. I know that because I've been told that today.

5 **MR. PLACITELLA:** You can't read this
6 report and come to the conclusion that it's a defense
7 report.

8 **SPECIAL MASTER:** I don't know what due
9 diligence whoever it was did when they were preparing
10 that privilege log.

11 I know that it was not Kirkland & Ellis.
12 And frankly, I would expect better from Kirkland &
13 Ellis. And I'm glad that they actually went back and
14 double-checked it and released the report, because it
15 was not work product.

16 So I understand your concern. I'm not
17 sure that it gets the credit that you want to give
18 it.

19 **MR. PLACITELLA:** It's not to point the
20 finger at Kirkland & Ellis. I never intended to do
21 that. They weren't involved.

22 **SPECIAL MASTER:** At least not in this
23 instance.

24 **MR. PLACITELLA:** No, no, no, no.
25 Despite the acrimony, we get along fine.

Page 165

1 And that wasn't my issue. They weren't
2 in the case at this point.

3 My issue was that this was produced in
4 2006. The lawyers for Engelhard and BASF knew what
5 this was. And for the next three years summary
6 judgment motions were still filed saying there was no
7 evidence, letters were still written saying that
8 there was no evidence, judges were still being told
9 there was no evidence.

10 And there's no getting away from the
11 fact that they had a report saying that there was
12 evidence.

13 And this report raised the whole issue
14 of the Westfall case all over again, because if you
15 look on their -- and I'll show you later. If you
16 look on the privilege log, there's all kinds of
17 references to the Westfall case.

18 So in 2005-2006, even if everyone forgot
19 and didn't know about the Westfall case, it was hot
20 and heavy as part of what was going on here and the
21 reason, I would submit to you, and you can infer,
22 that this case was settled quietly and this report
23 was buried. It is a logical inference that it was
24 ongoing.

25 And I don't know that it matters, if it

Page 166

1 does not, I will skip it, but there are numerous
2 examples to show that this was not just Cahill
3 Gordon, that their in-house counsel was getting
4 copied on the letters that were being sent out.

5 **SPECIAL MASTER:** Well, Mr. Sloane is
6 from Cahill Gordon.

7 **MR. PLACITELLA:** Michael Hassett is
8 Engelhard in-house counsel.

9 **SPECIAL MASTER:** Okay. But I'm just
10 saying that because --

11 **MR. PLACITELLA:** Yes.

12 **SPECIAL MASTER:** -- that's a little
13 misleading when you say Mr. Sloane and Michael
14 Hassett and underneath it you're saying Engelhard
15 in-house legal.

16 **MR. PLACITELLA:** Yes. Fair enough.

17 **SPECIAL MASTER:** Only Mr. Hassett was
18 Engelhard, correct?

19 **MR. PLACITELLA:** Fair enough. And I'm
20 happy to -- Charles Carter was an Engelhard
21 executive. He answered and swore to interrogatories
22 that were false, in addition to his affidavit.

23 Michael Hassett, who was the associate
24 general counsel, actually answered the
25 interrogatories and swore to them under oath. Just

Page 167

1 like in Jedlowski.

2 I don't know that we need to spend --

3 I'm happy to do it, but I want to take some guidance
4 from the Court on spoliation. I will just give you a
5 summary slide because a lot of it is already in the
6 brief.

7 **SPECIAL MASTER:** Which one? The
8 appendix?

9 **MR. PLACITELLA:** The appendix. What
10 evidence is still missing today? All of the original
11 testing reports with three exceptions are missing.

12 They have found copies of some of the
13 reports. But even the reports they've found are
14 missing attachments. The attachments would be the
15 scientific data -- not every time. Some are complete
16 to be fair. Many of the reports are missing the
17 scientific data. That would be important to
18 interpret the reports, to verify what was in them.
19 They're not there.

20 I took the deposition of the corporate
21 representative. There are only three original
22 documents remaining.

23 **SPECIAL MASTER:** Why is that even
24 relevant --

25 **MR. PLACITELLA:** It's relevant --

Page 168

1 **SPECIAL MASTER:** -- that there's only
2 three original documents left if everything else they
3 have is copies?

4 **MR. PLACITELLA:** Because the copies,
5 they only have a portion of what was there.

6 **SPECIAL MASTER:** Well, they have a
7 portion.

8 **MR. PLACITELLA:** Right.

9 **SPECIAL MASTER:** And that goes to the
10 weight of that document. It doesn't go to its
11 admissibility.

12 **MR. PLACITELLA:** No, no. I'm
13 misspeaking. There are two issues. There is the
14 entirety of what was the testing documents. They
15 have some portion of those, not all. And out of
16 that portion they have another that are incomplete.

17 So there are many documents, testing
18 documents that they have not been able to find.

19 **SPECIAL MASTER:** And these are documents
20 that go back how far?

21 **MR. PLACITELLA:** They go back all the
22 way to the 70s. Okay. And they don't have Dr.
23 Hemstock's files. They don't have Dr. Oulton. Dr.
24 Oulton was the scientist who was in charge of keeping
25 all the raw data, all the backup data. His files are

Page 169

1 missing.

2 **SPECIAL MASTER:** When did he stop
3 working there?

4 **MR. PLACITELLA:** He stopped there
5 sometime in the early 80s.

6 **SPECIAL MASTER:** So 30 years ago.

7 **MR. PLACITELLA:** Correct. All of the
8 original Westfall depositions are missing. The
9 majority of the exhibits to those depositions are
10 missing. The results from the Engelhard study of
11 the Johnson mine are missing.

12 I mean, I could go through this in great
13 detail, and I'm happy to do it. But I'm trying to
14 get through this presentation and get to the -- I'm
15 happy to supplement it.

16 But I will -- and, you know, I went to
17 the witnesses and I said, Ellen Poole, out of the 51
18 documents at the Hemstock deposition, they only have
19 10. And I highlighted those.

20 **MR. ASSAF:** Excuse me. May I just see
21 slide 133 for another second, the listing? Sorry.

22 **SPECIAL MASTER:** Go back one more.

23 **MR. ASSAF:** The previous slide. All
24 original depositions?

25 **MR. PLACITELLA:** Well, yes, that's what

Page 170

1 I said, all original depositions.

2 MR. ASSAF: Okay.

3 MR. PLACITELLA: They have --

4 MR. ASSAF: Sorry. Okay. That's
5 what -- I thought he said all depositions. I was
6 like, I -- okay. Sorry.

7 SPECIAL MASTER: I can read.

8 MR. PLACITELLA: The slide says all
9 original depositions. They have produced some
10 depositions, not all. They've produced --

11 SPECIAL MASTER: Out of a case that was
12 originally filed in 1979.

13 MR. PLACITELLA: Yes, your Honor.

14 SPECIAL MASTER: Okay.

15 MR. PLACITELLA: But they had a duty
16 to --

17 SPECIAL MASTER: Do you keep in your
18 firm files from cases in 1979?

19 MR. PLACITELLA: Your Honor, I am not a
20 defendant being sued over and over.

21 SPECIAL MASTER: It doesn't matter
22 whether you are or not.

23 MR. PLACITELLA: Yeah, we probably have
24 it on archive somewhere. But there is a duty to --

25 SPECIAL MASTER: I'd be stunned if you

1 did. But that's a different story.

2 **MR. PLACITELLA:** Well, I wasn't
3 practicing then.

4 **SPECIAL MASTER:** In '79?

5 **MR. PLACITELLA:** The point is -- sorry.

6 **SPECIAL MASTER:** Now you're making me
7 feel old.

8 **MR. PLACITELLA:** So the point is they
9 were being sued and they were --

10 **SPECIAL MASTER:** And you've insulted
11 Miss Gussack I want you to know.

12 **MR. PLACITELLA:** They had a duty to
13 preserve this evidence, your Honor, that was imposed
14 upon them.

15 They were being sued and they knew they
16 were going to be sued in the future. And Judge
17 Linares had in fact ruled that they had a duty to
18 preserve the evidence.

19 So we asked the witnesses, for example,
20 Miss Poole, only 10 exhibits were left from the
21 Hemstock deposition. I then went back --

22 **SPECIAL MASTER:** Well, did somebody go
23 back to the lawyers who actually were representing
24 Engelhard back then and say: Do you have it in your
25 files?

Page 172

1 **MR. PLACITELLA:** Someone should ask
2 them. I'm assuming the answer is no, that they
3 checked, because --

4 **SPECIAL MASTER:** They said no, they
5 didn't go back and check?

6 **MR. PLACITELLA:** I'm assuming that they
7 did. They're good lawyers. I'm sure they did what
8 they were obligated to do.

9 And so, for example, I went to Mr.
10 Steinmetz in August and I asked him: Let's go
11 through what you have left.

12 Now, recall Mr. Steinmetz testified he
13 didn't believe that Gale was even deposed. Okay.
14 So now we have Gale's deposition.

15 So what we did is we went back and
16 looked at what they've been able to recreate and
17 compared it to what was produced at the Gale
18 deposition. And we found that all of the exhibits in
19 red that he was examined on, they don't exist.

20 Now, I saw the letter from -- and some
21 of that was important. Some of those exhibits,
22 according to Mr. Gale's testimony, were notes he was
23 taking while he was looking under the microscope
24 saying what his findings were.

25 **SPECIAL MASTER:** But he testified at his

1 deposition about the contents of those notes,
2 correct?

3 **MR. PLACITELLA:** He testified --

4 **SPECIAL MASTER:** So even though --

5 excuse me. But even though the notes themselves may
6 not be around anymore, there is testimony as to what
7 the contents of the document were.

8 **MR. PLACITELLA:** Not really. They
9 testified what his recollection was. But his notes
10 had to have been much more detailed, because his
11 notes were detailing what he was seeing under the
12 electron microscope.

13 When he was deposed, he was being asked
14 what he recalled. And sometimes he said in his
15 deposition I don't recollect this myself, but there
16 it is in the document. I don't have an independent
17 recollection. Right.

18 So what was in there is not
19 insignificant.

20 They say in their brief: Well, he was
21 asked about Exhibit 50, which was the big binder from
22 the Hemstock deposition. And he said: Well, yeah, I
23 see in there, there are a couple of published reports
24 that were out in the public domain.

25 But he also verifies in his deposition

Page 174

1 that there were many other things in that binder that
2 are never mentioned.

3 We don't know what was in that binder,
4 frankly. We do know that we have no final report at
5 least in the public domain of what happened in that
6 investigation. We would have had his notes, but
7 they're gone. We have what's left of his testimony.

8 So we have a problem. There's a lot of
9 evidence missing. And I'm happy to have a
10 separate -- I don't want to spend all our time here
11 on this. I'm happy to separately address this and
12 have you rule on it if you want to. Or they can file
13 their motion for summary judgment as you've invited
14 them to do before.

15 But there is plenty of evidence on a
16 prima facie basis that there is still evidence
17 missing that they had a duty to preserve and they did
18 not.

19 **SPECIAL MASTER:** And then tie that
20 notion to what your prima facie basis is here,
21 because whether they had a duty to preserve or not,
22 the issue is have you demonstrated on a prima facie
23 basis to a fair preponderance of the evidence that
24 there is a factual basis for a good faith belief that
25 the exception to the attorney/client privilege should

Page 175

1 apply?

2 **MR. PLACITELLA:** Yes. And we believe
3 that we have done that. We believe we have
4 demonstrated to you that they had evidence. It was
5 evidence that was not insignificant. They had
6 multiple tests, not one or two tests. They had
7 scientists testify as to what they found. The
8 scientists did not say the evidence was nonsense.
9 They qualified where they could have.

10 But they had both the data, the reports,
11 the sworn testimony. They had all of that. Yet they
12 told litigants and courts that the data did not
13 exist, that the testimony did not exist, that the
14 information did not exist, that there was no
15 evidence, not that there was unreliable evidence.
16 They could have couched it.

17 And on that basis -- and then we have
18 them frankly boasting about the success of what they
19 did.

20 So independent of the issue of what
21 they've been able to dig up, what they've been able
22 to dig up only proves our case of what was withheld
23 from these litigants, because you have to look at the
24 point in time when the representations were made.

25 So the fact that they have dug stuff up,

Page 176

1 they found a box that they -- somebody had in, you
2 know, some file in Iron Mountain, only proves that
3 the representations they made were wrong.

4 And you only have to look at this.
5 Right. This is the Cahill collection.

6 **SPECIAL MASTER:** You mean the Cahill
7 compilation.

8 **MR. PLACITELLA:** The Cahill compilation.
9 The Cahill compilation as it has been represented is
10 all -- I know it's not all because we went through
11 this with Mr. Steinmetz. But a number of testing
12 documents.

13 And that compilation has been in the
14 files of BASF by their own admission. It was in the
15 personal file of Mr. Dornbusch by their
16 representation of their counsel -- I'm sorry, of
17 their corporate representative.

18 That compilation of all of the testing
19 documents, when they said we have no testing
20 documents, there is no evidence, when the general
21 counsel who worked in the same office was swearing on
22 interrogatories that the information did not exist,
23 this proves it. So the fact that they found it only
24 proves it.

25 Now, why do we think you have to look at

Page 177

1 that? Because they have stated --

2 **SPECIAL MASTER:** It's Exhibit 3 on your
3 submission. I looked at it.

4 **MR. PLACITELLA:** Right. Well, you
5 didn't look at the whole thing.

6 **SPECIAL MASTER:** Well, I looked at what
7 you gave me.

8 **MR. PLACITELLA:** Yes, but --

9 **SPECIAL MASTER:** Which by the way is
10 probably -- that entry alone is probably 150 pages.

11 **MR. PLACITELLA:** Yes.

12 **SPECIAL MASTER:** Actually more than
13 that. It's double-sided.

14 **MR. PLACITELLA:** But what's missing from
15 that, your Honor?

16 **SPECIAL MASTER:** Well, the first couple
17 entries where it says privileged documents
18 potentially omitted.

19 **MR. PLACITELLA:** Yes, your Honor. And
20 we're saying that you should --

21 **SPECIAL MASTER:** And there's three of
22 those.

23 **MR. PLACITELLA:** They have represented
24 that the Cahill compilation includes testing
25 information, information relevant to the issue of

Page 178

1 asbestos in the Emtal talc. They are withholding
2 documents from that compilation.

3 We have indicated in our original
4 submission, they say we did not identify the
5 documents we wanted you to look at, but we did
6 identify this document on our original submission.
7 And we are asking you --

8 **SPECIAL MASTER:** That was the one that
9 was miscited in --

10 **MR. PLACITELLA:** Right. The wrong
11 footnote.

12 **SPECIAL MASTER:** Well, the right
13 footnote, wrong identification.

14 **MR. PLACITELLA:** We are asking you --

15 **SPECIAL MASTER:** And Mr. Jared
16 Placitella is throwing himself under the bus over
17 that one.

18 **MR. PLACITELLA:** I would never do that.

19 **SPECIAL MASTER:** He did it to himself.

20 **MR. PLACITELLA:** We are -- keep your
21 hand down.

22 So we are asking you to look at the
23 entire compilation, because obviously they've already
24 admitted that the information is relevant.

25 So then the question is: What were they

Page 179

1 withholding? Because if they have admitted that it
2 was relevant to the issue of testing and they had it
3 in their possession at the same time the
4 misrepresentations are being made, that's a prima
5 facie case to trigger crime fraud.

6 **SPECIAL MASTER:** Let me ask you this.
7 The Cahill compilation, did you get that from
8 Kirkland & Ellis?

9 **MR. PLACITELLA:** Yes, your Honor.

10 **SPECIAL MASTER:** And do you have any
11 reason to believe that the Kirkland & Ellis folks
12 have asserted attorney/client privilege or attorney
13 work product on documents where the assertion was not
14 at least colorable?

15 **MR. PLACITELLA:** I think they made a
16 good faith judgment that they could withhold those
17 documents --

18 **SPECIAL MASTER:** I'm thinking in --

19 **MR. PLACITELLA:** -- on the basis that
20 they have asserted.

21 **SPECIAL MASTER:** I'm thinking in terms
22 of the other document that you discussed that
23 appeared on a privilege log --

24 **MR. PLACITELLA:** No.

25 **SPECIAL MASTER:** -- that they did not

Page 180

1 prepare --

2 **MR. PLACITELLA:** No.

3 **SPECIAL MASTER:** -- they took a look at
4 it and they said: This doesn't belong on the
5 privilege log --

6 **MR. PLACITELLA:** No, no, no, I don't
7 think --

8 **SPECIAL MASTER:** -- and they handled it
9 over.

10 **MR. PLACITELLA:** I don't have any --
11 that's not what they do.

12 **SPECIAL MASTER:** Okay.

13 **MR. PLACITELLA:** No.

14 **SPECIAL MASTER:** So it is fair for me to
15 assume that at least for the first three entries in
16 the Cahill compilation where they are asserting
17 privilege, that at least there's a good faith basis
18 for that assertion?

19 **MR. PLACITELLA:** I understand the good
20 faith basis. And in fact, I know what the documents
21 are. And I can't say, you know, what they are --

22 **SPECIAL MASTER:** No, you can't.

23 **MR. PLACITELLA:** -- I do believe --

24 **SPECIAL MASTER:** Not to me at least.

25 **MR. PLACITELLA:** -- they had a good

Page 181

1 faith basis to make the --

2 **SPECIAL MASTER:** To assert the
3 privilege.

4 **MR. PLACITELLA:** -- assertion initially.

5 **SPECIAL MASTER:** Okay.

6 **MR. PLACITELLA:** But we're saying that
7 you need to look at these documents. We believe that
8 they've already admitted that the compilation,
9 including the documents that are being withheld, are
10 relevant on that very issue that the
11 misrepresentation is being made.

12 And if this document was in Mr.
13 Dornbusch's personal file while his office was
14 swearing under oath that no documents existed, then
15 all of it has to come out, not just the documents
16 that they so choose. So -- somebody's passing me a
17 note.

18 **SPECIAL MASTER:** I think it's Mr. Assaf
19 telling you that you've gone too long.

20 **MR. PLACITELLA:** Well, I'm almost done.

21 **SPECIAL MASTER:** Okay.

22 **MR. PLACITELLA:** I'm almost done. So
23 let me just -- then we've asked for the evidentiary
24 record.

25 I heard -- now, there is a difference.

Page 182

1 We are not asking for you -- we've already been told
2 the Court did not want Justice Stein's opinion. We
3 understand that.

4 What we're saying is that you should
5 look at two things.

6 **SPECIAL MASTER:** I can't. The order
7 from the Supreme Court impounds that entire record.
8 That's what it says, the record is impounded.

9 You don't want to run the risk of giving
10 it to me. And I certainly do not want to run the
11 risk of looking at something that's been impounded,
12 not when I know that it's been impounded. I can't
13 say: Gee, I didn't know that. I now know it. I
14 have a copy of the Court's order.

15 **MR. PLACITELLA:** We may have to do
16 something to remedy that. But I understand.

17 **SPECIAL MASTER:** Well, you must -- I
18 can't --

19 **MR. PLACITELLA:** But I understand your
20 point. Just so the record is clear though, when our
21 brief was originally filed, we asked for this
22 information.

23 **SPECIAL MASTER:** The order came out
24 actually after your reply brief was filed. So I'm
25 not blaming you for it. I'm just saying the state of

Page 183

1 the universe is different now than it was when you
2 were asking for the relief here. And I just can't
3 accept that.

4 **MR. PLACITELLA:** I understand, your
5 Honor. The point I'm making here is a statement was
6 made that we never identified any documents that we
7 wanted you to look at and therefore somehow we were
8 deficient or our submission was deficient. That's
9 actually not true. We first identified the
10 compilation. We asked you to look at that.

11 **SPECIAL MASTER:** Which I did because
12 gave it to me.

13 **MR. PLACITELLA:** No, you didn't look at
14 the documents being withheld.

15 **SPECIAL MASTER:** Okay.

16 **MR. PLACITELLA:** We asked you to look
17 initially at the evidentiary record because there are
18 depositions in that record. And those depositions
19 themselves --

20 **SPECIAL MASTER:** Which evidentiary
21 record?

22 **MR. PLACITELLA:** Of the Samson case.
23 I'm saying initially they said we did not identify to
24 you documents. That was before this order came out.
25 We actually did identify documents. We identified

Page 184

1 the Samson record. I did not want to be anymore
2 descript than that for fear of violating the order
3 myself.

4 So what we did do is we gave you -- you
5 now have a list from us.

6 **SPECIAL MASTER:** I have a list. All I
7 have is a list of Bates numbers. That doesn't make
8 me any smarter.

9 **MR. PLACITELLA:** So I want to put some
10 things in context for you, and I went back and did
11 this, and how we can deal with the impounding order,
12 because now it's an issue. It wasn't before.

13 So if you look, for example, at the
14 Ashton affidavit and you compare that to the
15 privilege log, you can see all of the documents that
16 surrounded the creation of the Ashton affidavit that
17 are being withheld.

18 We believe, given the fact that the
19 Ashton affidavit is at least misleading on its face,
20 if not an outright misrepresentation, that you should
21 look at the documents that are behind the Ashton
22 affidavit. And we can identify them for you. And
23 here they are.

24 **SPECIAL MASTER:** Did you do that before
25 today?

Page 185

1 **MR. PLACITELLA:** Because what we did
2 was, we did it by time frame.

3 **SPECIAL MASTER:** Please answer my
4 question.

5 **MR. PLACITELLA:** I'm sorry.

6 **SPECIAL MASTER:** Did you identify those
7 documents as being disclosed or related or referred
8 to in the Ashton affidavit that you're now presenting
9 in this Power Point presentation on number 169, did
10 you ever get that to me before today?

11 **MR. PLACITELLA:** I did not, because
12 frankly I was doing it in the last couple of days,
13 trying to figure out how to get around the fact that
14 I'm not now allowed to talk about even asking for
15 what was under the Samson proceeding.

16 So I'm trying to come up with a way to
17 put in context a way to deal with this.

18 **SPECIAL MASTER:** Okay.

19 **MR. PLACITELLA:** I mean, it's a little
20 bit of a moving target. And I apologize.

21 **SPECIAL MASTER:** Well, you're supposed
22 to make my life easier, not harder.

23 **MR. PLACITELLA:** I understand.

24 **SPECIAL MASTER:** But I'll blame Mr.
25 Pasternack. It's your time to get blamed.

Page 186

1 **MR. PLACITELLA:** The same thing, we can
2 identify in time the entries that went into creating
3 the Carter affidavit.

4 **SPECIAL MASTER:** And again, same
5 question?

6 **MR. PLACITELLA:** Same answer. On the
7 asbestos in mine -- I call it the asbestos in mine
8 study, the study that was done in 1979, we can
9 identify in time the documents that appear to relate
10 to that study.

11 So for example, there are a bunch of
12 documents listed in time from the actual scientists
13 versus some lawyer.

14 **SPECIAL MASTER:** Do we have a number for
15 this shot?

16 **MR. PLACITELLA:** It's 171.

17 **SPECIAL MASTER:** Okay.

18 **MR. ASSAF:** Your Honor, just following
19 up on your earlier comment, I would ask the number of
20 the slide be put in, but also that Mr. Placitella --

21 **SPECIAL MASTER:** I think every slide
22 that was shown here today must be submitted.

23 **MR. PLACITELLA:** I'm going to do that.

24 **SPECIAL MASTER:** And I know we talked
25 about that at the break.

Page 187

1 **MR. PLACITELLA:** Right. I'm going to do
2 that.

3 **SPECIAL MASTER:** I just wanted to put
4 that on the record.

5 **MR. ASSAF:** And I think to your first
6 question, I think the answer is the same for all
7 these. These have not been produced before today; in
8 other words, have not been collated. I just want
9 that in the record. This is the first time anybody's
10 seen this correlation, just like on the first
11 question you asked.

12 **SPECIAL MASTER:** Okay. I assume that
13 based upon Mr. Placitella's response to my question
14 earlier, that pretty much everything that's in this
15 section of his argument is stuff that he has
16 developed in the last few days and therefore many of
17 us in this room are seeing this for the first time.

18 Is that fair?

19 **MR. PLACITELLA:** That's fair. That's
20 fair. Documents related to I call it the purge
21 memo, and this is a good example. If you see the
22 purge memo was March 7, 1984. And if you actually
23 look at the privilege log, there are five other
24 entries on that exact date. And it talks about file
25 preservation. And it comes from Cahill Gordon. We

Page 188

1 think you need to look at that.

2 **SPECIAL MASTER:** These are all memos
3 from Mr. Sloane to someone in-house at BASF?

4 **MR. PLACITELLA:** Correct.

5 **SPECIAL MASTER:** All five of those,
6 they're the ones in yellow?

7 **MR. PLACITELLA:** Correct.

8 **MR. COREN:** That's not correct. I think
9 Kempo is Cahill Gordon, your Honor.

10 **SPECIAL MASTER:** So it's a within Cahill
11 Gordon communication?

12 **MR. COREN:** Yes.

13 **MR. PLACITELLA:** But it's the same exact
14 date.

15 **SPECIAL MASTER:** I understand that. But
16 it's still within Cahill Gordon. Never got to BASF.

17 **MR. PLACITELLA:** I'm not allowed to talk
18 about that.

19 Documents that relate to the Westfall
20 settlement all the way up to the purge memo, and we
21 believe we've showed you that they've destroyed the
22 Glassley evidence.

23 We showed you the date of the Westfall
24 settlement. In between the Westfall settlement and
25 the purge memo are a number of entries in that also

Page 189

1 is destruction of the Glassley evidence. That's the
2 time frame that we're talking about.

3 **SPECIAL MASTER:** During which time the
4 Schwartz case was pending in California?

5 **MR. PLACITELLA:** Right. We believe --
6 and there are actually entries here that talk about
7 these issues.

8 We believe you need to look at the
9 documents from the date of the settlement to the date
10 of the purge memo to see really what the context was.
11 Was it really a document preservation memo? You can
12 find that out.

13 And then for a lot of these
14 misrepresentations there are entries that correspond
15 to -- in time at least to the misrepresentations.

16 The Martin case with Dr. Glassley, there
17 are a number of entries in the privilege log related
18 to the Martin case. And it actually says Martin
19 Emtal litigation. We believe based upon what we've
20 shown you that you should look at that.

21 And in fact, one entry on the privilege
22 log talks about -- I'll wait -- the 7/23/2005 entry
23 actually talks about what to do about the Westfall
24 deposition.

25 **SPECIAL MASTER:** Can you do me a favor?

1 Can you go back --

2 **MR. PLACITELLA:** I want to make sure,
3 because I didn't show you each one of these and I
4 want --

5 **SPECIAL MASTER:** Stop right there. Oh,
6 you went one too many. That one. It says in the
7 bottom righthand corner Exhibit 21B.

8 **MR. JARED PLACITELLA:** That's the image,
9 your Honor. That's the image of the May 17, 1989,
10 letter.

11 **SPECIAL MASTER:** Of the letter?

12 **MR. JARED PLACITELLA:** Right.

13 **SPECIAL MASTER:** Exhibit 21 is the
14 transcript of the deposition of Ernest Baim.

15 **MR. JARED PLACITELLA:** You're correct,
16 your Honor. I apologize. It's paragraph 21 of the
17 certification in support of the motion, but it's
18 really Exhibit 17.

19 **SPECIAL MASTER:** Okay. Is it 17B?

20 **MR. JARED PLACITELLA:** Yes, your Honor.

21 **SPECIAL MASTER:** Okay. And that's a
22 letter from Mr. Dembrow to Jeffrey Schwartz at Mr.
23 Rothenberg's firm of May 17, 1989?

24 **MR. JARED PLACITELLA:** Yes, your Honor.

25 **SPECIAL MASTER:** Okay.

1 **MR. PLACITELLA:** So if you look at this
2 entry of 7/22/2005, this is during the time the
3 Martin case was pending. It talks about a review of
4 the Westfall depositions.

5 **SPECIAL MASTER:** Who is -- Mr. Dembrow
6 is at Cahill. Who is --

7 **MR. PLACITELLA:** Cahill.

8 **SPECIAL MASTER:** -- M. Sullivan?

9 **MR. PLACITELLA:** Paralegal at Cahill.

10 **SPECIAL MASTER:** So this is again a
11 within Cahill communication.

12 **MR. PLACITELLA:** Correct. And it's
13 talking about in 2005, at least on its face, a review
14 of the Westfall depositions.

15 **SPECIAL MASTER:** Okay.

16 **MR. PLACITELLA:** Well, the Westfall
17 depositions have never been revealed between 1988
18 when the Ashton affidavit was executed and 2005. But
19 somebody had the Westfall depositions. When they
20 swore under oath the depositions didn't exist,
21 somebody had the depositions.

22 **SPECIAL MASTER:** Not unless that e-mail
23 says: I looked for the depositions, I can't find
24 them, can you help me?

25 **MR. PLACITELLA:** I guess you'll have to

Page 192

1 find out. But somebody knows that the depositions
2 were taken. And somebody is still answering
3 interrogatories after this entry saying the
4 depositions were never taken. Motions are still
5 being filed.

6 **SPECIAL MASTER:** I don't -- well, I'm
7 sorry, I don't want to interrupt your argument
8 anymore. I just -- the rationales that you give to
9 all of these are obviously the rationale that foots
10 most cleanly with what you're trying to advance.

11 My problem is that I have to look at it
12 and say: What are the reasonable inferences of
13 what's being said?

14 And that one in particular can mean a
15 hundred different very innocuous, meaningless things
16 that are not the color you're putting to it.

17 **MR. PLACITELLA:** Yes. But what's the
18 reasonable inference your Honor?

19 **SPECIAL MASTER:** Well, that's the
20 problem. What's the reasonable inference?

21 **MR. PLACITELLA:** Well, let me articulate
22 it.

23 **SPECIAL MASTER:** Is the reasonable
24 inference the inference that everything that Cahill
25 Gordon touched somehow had some kind of cooties on

Page 193

1 it?

2 Or is the reasonable inference that we
3 are talking about a venerable law firm that would be
4 acting in an honest and ethical manner? Or somewhere
5 in between those two?

6 What's the reasonable inference? That's
7 exactly the problem I'm having.

8 **MR. PLACITELLA:** Well, the reasonable
9 inference as I would articulate it to you is as
10 follows. From 1988 to 1989 they swore under oath no
11 depositions existed. In 2005 it's clear that at
12 least they know depositions existed.

13 **SPECIAL MASTER:** No.

14 **MR. PLACITELLA:** And of course they did
15 know because they were at the depositions in 1983.
16 So they resurface at least in discussions in 2005.

17 **SPECIAL MASTER:** What we know is there
18 is an e-mail from a lawyer to a paralegal in that
19 same firm about certain depositions. And the e-mail
20 could be nothing more than: Dear Miss Sullivan, can
21 you please retrieve from storage the depositions in
22 Westfall?

23 And there may have been an e-mail back
24 from Miss Sullivan that says: I looked and there are
25 none.

Page 194

1 This is 2005. And the deposition that
2 you're talking about was taken 22 years before.

3 **MR. PLACITELLA:** I'm showing you a
4 single entry where I believe you can infer that
5 people at Cahill Gordon knew it was ongoing. All
6 right.

7 **SPECIAL MASTER:** You're absolutely
8 right. I can infer that. The question is, is that
9 a reasonable inference? That's what I'm struggling
10 with.

11 **MR. PLACITELLA:** I believe it's a
12 reasonable inference for the following reason. They
13 were at the depositions in 1983.

14 **SPECIAL MASTER:** You're not hearing me,
15 Mr. Placitella. Assume they were at the depositions
16 in 1983. Mr. Dembrow was not handling the
17 deposition in 1983, was he?

18 **MR. PLACITELLA:** I'm sure he was not.

19 **SPECIAL MASTER:** Okay. In 2005, 23
20 years later, he sends an e-mail to a paralegal about
21 those depositions. We don't know what the subject
22 matter is.

23 But is it reasonable to say that I have
24 looked at these depositions -- that the e-mail says:
25 I have looked at these depositions and I'm going to

Page 195

1 put them in a very, very dark and deep corner so that
2 no one can see them? Is that reasonable? I don't
3 know. I don't think so.

4 **MR. PLACITELLA:** Was it reasonable, your
5 Honor, after 2005, knowing that the depositions took
6 place and that there was a discussion to continue to
7 swear in answers to interrogatories that no
8 depositions took place?

9 **SPECIAL MASTER:** Well, if the paralegal
10 goes and searches and says we don't have any such
11 depositions, here you have a lawyer who was not part
12 of it at the beginning being able to say, well, okay,
13 there are no depositions.

14 **MR. PLACITELLA:** Right. And I
15 understand your issue. That's the purpose of an in
16 camera review, for you to see that, for you to make
17 those determinations.

18 You don't have to make a leap of faith.
19 I'm saying is there a reasonable good faith belief to
20 suspect and examine it? And I'm saying if you look
21 at the entries --

22 **SPECIAL MASTER:** My problem with that is
23 that what you're proposing, which is go look at the
24 documents to then determine if we have a prima facie
25 case seems to me a post hoc ergo propter hoc kind of

Page 196

1 analysis, which I don't think is appropriate under
2 these circumstances.

3 **MR. PLACITELLA:** Your Honor, that's not
4 what I'm saying. What I'm saying -- you can do that
5 under the law, by the way.

6 **SPECIAL MASTER:** I'm not so sure about
7 that.

8 **MR. PLACITELLA:** I'm pretty sure.

9 **SPECIAL MASTER:** I know you're arguing
10 it. But I'm not so sure.

11 **MR. PLACITELLA:** You can do that. I
12 don't think you need to do that.

13 And then I think you need to look at the
14 documents that -- the privilege log at the time the
15 fraud was discovered.

16 So for example, I just highlighted this
17 one, 7/13/2009. This is after the fraud is
18 discovered in the Paduano case. And it talks about a
19 discussion with Arthur Dornbusch regarding the
20 Paduano case.

21 Now, Arthur Dornbusch had been out of
22 there for three or four years now. They went back
23 and apparently interviewed Arthur Dornbusch. What he
24 had to say may be highly relevant to the issue of
25 what did he know, what information was being

Page 197

1 withheld, what documents were destroyed?

2 I mean, all those things I submit are
3 ripe for your review.

4 **SPECIAL MASTER:** Highly relevant doesn't
5 mean you waive the privilege or that the privilege
6 should be pierced.

7 I assume -- not I assume. Relevance
8 has nothing to do with the inquiry today.

9 The inquiry today is have you
10 demonstrated by a fair preponderance of the evidence
11 a prima facie case that would sustain the application
12 of the (a) exception to the attorney/client
13 privilege?

14 And I will tell you very candidly I
15 don't think you've argued at all today and only in a
16 footnote in your original submission and in the last
17 two pages of your reply brief the Kozlov exceptions.

18 And frankly, I think that's wise,
19 because I think that the Kozlov exception has been
20 severely limited of late and in my view properly so.
21 So I don't think that that's where you want to hang
22 your hat.

23 You want to hang your hat if at all on
24 the (2)(a) exception to the attorney/client
25 privilege, which is fine.

Page 198

1 But there's a process for that, and
2 that's what I'm trying -- I'm trying to fit all of
3 this within that process.

4 **MR. PLACITELLA:** We rely on our brief as
5 it relates to the Kozlov exception. I'm trying not
6 to spend all the time -- you know, we only have so
7 much time.

8 But let me just bring it back to --

9 **SPECIAL MASTER:** And you've been at it
10 for two hours and 15 minutes.

11 **MR. PLACITELLA:** Let me just -- let me
12 end here. We started with is there a reasonable
13 basis to suspect that the privilege-holder was
14 intending to commit a crime or a fraud in violation
15 of the New Jersey statute?

16 I believe that within our submissions
17 and what we've highlighted here today we have
18 demonstrated to you the following. BASF or Engelhard
19 had numerous tests and information that there was
20 asbestos in their talc at whatever levels. They
21 sent those tests out. They were verified by
22 multiple laboratories. They verified it themselves.
23 Their scientists testified to the same.

24 In the face of that, they told their
25 customers there was not even a trace, nothing. It

Page 199

1 was asbestos-free.

2 When it came to having testimony, their
3 lawyers, their scientists swore under oath with their
4 lawyers sitting right there that they found asbestos
5 in the talc at whatever levels.

6 Those same lawyers who sat in those
7 depositions, the same lawyers were in charge of that
8 litigation. Many have showed up at conferences with
9 courts, many wrote the letters, the same lawyers
10 wrote letters to litigants saying there was no
11 evidence of asbestos in the talc. They told courts
12 there was no evidence of asbestos in the talc. They
13 had cases and they bragged about having dismissals,
14 about there being no evidence of asbestos in the
15 talc.

16 If you look at the totality of the
17 evidence, the fact that they had the information,
18 that they were there, there's no mistaking it, and
19 they made those representations knowing that they
20 were not true, that we have demonstrated to you by
21 more than a preponderance of the evidence, by more
22 than a reasonable basis, I think it's clear and
23 convincing that a prima facie case of crime fraud
24 under our rule and the expansive definition that our
25 rule has been given by our Supreme Court provides.

Page 200

1 And if you look at the totality of the
2 evidence that we've given to you and not the little
3 pieces, the totality of the evidence, you have to
4 come -- we submit you have to conclude that we need
5 to go to the next step, that we've given you enough
6 evidence to make out a prima facie case for you to go
7 look at the documents and make a decision about
8 whether those documents are in violation given all
9 the circumstances of our rules and whether they
10 should be released.

11 **SPECIAL MASTER:** And the documents you
12 want me to look at are those that are listed in
13 Appendix C to your motion?

14 **MR. PLACITELLA:** Yes. I understand your
15 position about you can't see the whole record. But
16 let me say this --

17 **SPECIAL MASTER:** My question is simple.
18 Okay. You have an Appendix C which is submitted
19 only to the BASF folks and me that lists what I
20 number to be 61 documents. Some of them are kind of
21 hard to tell because there are three entries in one
22 box. When there's two entries I assume that the
23 first entry is the beginning page and the last --
24 the entries on the last page. That's all assumption
25 on my part.

Page 201

1 But looking at Exhibit C, you're asking
2 me to look at those 61 entries to determine whether
3 the attorney/client privilege should be pierced in
4 respect of those documents only?

5 **MR. PLACITELLA:** And included within
6 that, and I think it's there, is the Cahill
7 compilation, the documents within the Cahill
8 compilation.

9 **SPECIAL MASTER:** Well, I can't make that
10 up. Okay. You gave me an appendix that listed the
11 documents that you think are subject to review.
12 Quote, plaintiffs list the following documents for
13 review should the Court deem an in camera evaluation
14 necessary.

15 These are the documents that you want
16 disclosed?

17 **MR. PLACITELLA:** Yes.

18 **SPECIAL MASTER:** Okay. And they're
19 marked by Bates number, so they are what they are.

20 **MR. PLACITELLA:** And we asked for in our
21 brief, if it's not there by Bates number, I think it
22 actually is, that you review the balance of the
23 documents in the Cahill compilation.

24 **SPECIAL MASTER:** All right. I don't
25 know what those are because they're not marked.

Page 202

1 **MR. PLACITELLA:** It's a single exhibit.

2 **SPECIAL MASTER:** No. There's an exhibit
3 of the Cahill compilation. But there are three --
4 what appear to be three documents that were withheld.

5 **MR. PLACITELLA:** I think there's more
6 than that, your Honor.

7 **SPECIAL MASTER:** Well, I'm just --
8 there might be more because I'm looking -- there's
9 one at the very end. All right. We're going to
10 make this really easy.

11 Mr. Jared Placitella, I want you to take
12 your exhibit, your Appendix C, and I want you to
13 provide me a complete list of the documents that you
14 want me to look at. Okay. And those are the
15 documents about which you are making a claim should
16 be disclosed as an exception to the attorney/client
17 privilege.

18 If it's not on that list, it's not going
19 to be considered. And it's not an invitation to
20 make that list any broader or any longer than what it
21 already is.

22 Do we understand each other?

23 **MR. JARED PLACITELLA:** Yes, your Honor.

24 **SPECIAL MASTER:** You're going to get
25 that to me by Monday? Can you do that? Is that too

Page 203

1 soon?

2 **MR. JARED PLACITELLA:** It might --

3 **SPECIAL MASTER:** Speak up.

4 **MR. JARED PLACITELLA:** It might be too
5 soon, your Honor.

6 **SPECIAL MASTER:** Okay. When can you get
7 it to me by.

8 **MR. JARED PLACITELLA:** Can we do
9 Wednesday?

10 **SPECIAL MASTER:** Wednesday is fine.
11 That's the 28th. Seton Hall plays Villanova that
12 night in Newark. Basketball that is.

13 **MR. JARED PLACITELLA:** Yes, your Honor.

14 **SPECIAL MASTER:** Anything else, Mr.
15 Placitella?

16 **MR. PLACITELLA:** No, your Honor.

17 **SPECIAL MASTER:** Okay. I don't know
18 who's going speak on behalf of BASF or Cahill, but we
19 need about a five minute break.

20 And I should tell everyone what Mr.
21 Placitella told me during the earlier break. He has
22 a hard stop at 3:30.

23 But there are five other lawyers on
24 behalf of the plaintiffs here. I'm sure that among
25 them collectively they will be able to provide an

Page 204

1 approximation of Mr. Placitella's advocacy. So we're
2 going to rely on that, if okay with you. I don't
3 want to hold you up, Mr. Placitella.

4 **MR. PLACITELLA:** Well, I'll make a
5 couple phone calls.

6 **SPECIAL MASTER:** Well, no, what you got
7 to do is important. So let's take a short break.

8 (Break.)

9 **SPECIAL MASTER:** Mr. Assaf, are you
10 doing the honors?

11 **MR. ASSAF:** I'm going to have a few
12 words, your Honor, and then I'm going turn it over to
13 Mr. Bress to handle some of legal issues.

14 And then Mr. Farrell, with the kindness
15 of Mr. Placitella, I think is going to take apart a
16 couple of Mr. Placitella's slides. So he'll ask him
17 to put up, for example, slide 33.

18 And since we don't have the slides yet,
19 but I think Mr. Placitella or Jared will help us out
20 on that one.

21 **MR. PLACITELLA:** We got a little
22 technical problem I just found out. We're in the
23 same -- we use the same connection.

24 **MR. ASSAF:** We'll take the other one
25 down.

1 **MR. PLACITELLA:** And Sean apparently
2 took the adapter.

3 **SPECIAL MASTER:** Okay. We'll muddle
4 along as best we can. Okay.

5 **MR. ASSAF:** And so, your Honor, I'm
6 going to turn it over to Mr. Bress.

7 **SPECIAL MASTER:** Mr. Pasternack, do you
8 have those?

9 **MR. PASTERNAK:** No, I don't.

10 **SPECIAL MASTER:** You don't have the
11 slides?

12 **MR. PASTERNAK:** It's on his laptop.

13 **SPECIAL MASTER:** Can you e-mail them to
14 whom ever it is that's -- is that you, Mr. Anguas?

15 **MR. ANGUAS:** No, I'm just over here
16 presenting for Kirkland.

17 **SPECIAL MASTER:** Right. If he e-mails
18 them to you, you can then present them for the
19 Kirkland side, right?

20 **MR. ANGUAS:** Right.

21 **MR. ASSAF:** That would be great.

22 **SPECIAL MASTER:** So can you do that?

23 **MR. PLACITELLA:** Well, I have to figure
24 out -- I can't e-mail all the slides because I only
25 showed a small portion of them.

Page 206

1 **MR. ASSAF:** Mr. Roth is going to bring
2 the slides back -- or the adapter back, so I think
3 the problem is solved.

4 **SPECIAL MASTER:** Okay. Whatever. If
5 not, I'm going to submit you to the tender mercies of
6 Mr. Reiley, which means none of you is going to like
7 what the results are going to be. I speak from
8 experience.

9 **MR. ASSAF:** Well, thank you, your Honor.
10 Before I turn it over to Mr. Bress and Mr. Farrell, I
11 do have two -- three procedural points I'd like to
12 raise.

13 The first is actually early on in the
14 argument in response to one of your questions,
15 plaintiffs' counsel said BASF continued the fraud
16 after the acquisition and the fraud would still be
17 continuing today but for being uncovered in 2009.

18 **SPECIAL MASTER:** Other than the
19 rhetorical flourish that I assume all of those
20 statements have --

21 **MR. ASSAF:** Well, I just can't -- a lot
22 of things in this case, we'll argue about a lot of
23 facts. But the notion that BASF was somehow involved
24 in orchestrating this fraud, Mr. Placitella knows
25 that's untrue. In prior iterations he's told Courts

Page 207

1 that. And I can't allow that to go unrebutted.

2 Number 2, or along that line, I think
3 your Honor raised this question --

4 **SPECIAL MASTER:** Tell me, Mr. Assaf,
5 when did Kirkland start representing BASF in this
6 matter?

7 **MR. ASSAF:** We got a call in November of
8 2009. And I was -- that's my lead into the next
9 point, your Honor.

10 **SPECIAL MASTER:** I knew that.

11 **MR. ASSAF:** We were engaged in 2010
12 fully. And I talked to Miss Desai at the break. In
13 terms of the document efforts that your Honor I think
14 asked some questions about, it took us a while to
15 start to uncover all of these documents. BASF has
16 spent literally millions of dollars going to storage
17 facilities, going to Cahill storage facilities,
18 replicating whatever documents existed for this
19 legacy business that went out of business in 1982
20 that it acquired in 2006.

21 So again, I just don't want your Honor
22 to think BASF has done anything except exercise
23 outstanding stewardship of a problem that they
24 inherited.

25 **SPECIAL MASTER:** I will tell you that,

Page 208

1 at least as far as I can tell, this case was filed in
2 March of 2011. And there's been nothing that has
3 been said to me that would lead me to believe that
4 BASF or Cahill has done anything since the filing of
5 this lawsuit other than act in the manner that I
6 would expect litigants and their counsel to act. So
7 that's really not a problem.

8 I think what Mr. Placitella's -- the
9 import of what Mr. Placitella was trying to say was
10 that if you look at everything up until that point,
11 it suffices to establish a prima facie case that by a
12 preponderance of the evidence there is a reasonable
13 basis upon which to pierce the attorney/client
14 privilege.

15 Now, that's a very vanilla statement
16 without any of the rhetoric that honestly I fully
17 expect advocates to throw in every so often. After a
18 while, if you do it too often, it loses its
19 effectiveness, which sounds to me as being somewhat
20 counterproductive.

21 But be that as it may, that's what I
22 understood him to say.

23 So I don't think that Mr. Placitella or
24 anybody on the plaintiffs' side is indicting the
25 current iteration of the clients and lawyers on the

Page 209

1 defense side. I don't think that's the case at all.

2 Am I right, Mr. Placitella?

3 **MR. PLACITELLA:** Never suggested to the
4 contrary.

5 **SPECIAL MASTER:** He can't bring himself
6 to say that I'm right. But that's okay.

7 **MR. PLACITELLA:** I said you're right
8 many times today.

9 **MR. ASSAF:** So the second procedural
10 issue, your Honor, is the procedure here. And I
11 think the last 25 to 35 minutes of the slides that
12 Mr. Placitella now identifying documents, I'm pretty
13 sure he said one of the reasons -- the primary reason
14 he was doing that was because of the whole Samson
15 order. And he had just -- he had asked for Samson to
16 be reviewed and then the Samson order intervened.

17 And, your Honor, I don't think that's
18 correct with the record. I think on January 15th at
19 the hearing, and we'll put on the record the colloquy
20 from page 176 to 182, we had this very discussion
21 about the identification of documents.

22 And Mr. Placitella told you at that time
23 that he did not identify the documents because I
24 didn't think that's what you wanted, you, Justice.

25 And you said: I don't know where you

Page 210

1 got that from.

2 There is no mention that, oh, well,
3 Samson, I'm just referring back to Samson.

4 He filed this motion without identifying
5 documents. And his point then, at least a month ago,
6 was he did it because he didn't think that's what you
7 wanted.

8 **SPECIAL MASTER:** Well, the record is
9 what the record is. And the applicable legal
10 standards are what the applicable legal standards
11 are. So can we dovetail there?

12 **MR. ASSAF:** And we are. I'm going to
13 turn that over to Mr. Bress now.

14 But the last procedural point on the
15 legal standard, just so I understand it clearly, is
16 that plaintiffs' law firm is going to provide to BASF
17 and your Honor a listing of the 61 documents that
18 they believe satisfy a prima facie case in
19 furtherance of a crime or a fraud.

20 **SPECIAL MASTER:** No, it's more than
21 that. It's 61 plus the ones from the Cahill
22 compilation that they claim, number 1, satisfy the
23 prima facie -- or assist in satisfying the prima
24 facie burden they must meet, and secondly are the
25 documents for which they are seeking disclosure.

Page 211

1 Okay. So that it's not this incredibly
2 large universe out there. It's actually fairly
3 limited, given the number of documents in this case.

4 And as counsel already know, I mean,
5 I've done privilege reviews on more than 61 documents
6 already. And you can ask Mr. Reiley, who had to take
7 my gibberish and turn it into redacted documents.

8 **MR. ASSAF:** Okay. So that's -- I'm glad
9 for clarification on that.

10 And I will now turn it over to Mr.
11 Bress, who's going to address the legal standards and
12 continue the argument.

13 **SPECIAL MASTER:** Mr. Bress?

14 **MR. BRESS:** Thank you, your Honor. Dan
15 Bress with Kirkland & Ellis for BASF.

16 Your Honor, obviously on behalf of us,
17 on behalf of our client, our general counsel who's
18 here today, we appreciate you holding the hearing.
19 We appreciate --

20 **SPECIAL MASTER:** Don't appreciate
21 holding the hearing. It's what we're supposed to do.

22 **MR. BRESS:** And I was also going to say
23 we appreciate the care and attention you're obviously
24 giving to this significant motion.

25 **SPECIAL MASTER:** Just so that you know,

Page 212

1 one of my favorite comics is Chris Rock.

2 **MR. BRESS:** I enjoy him as well.

3 **SPECIAL MASTER:** Right answer. And he
4 has a great routine from very early on in his career
5 about people taking care of their kids. And he's
6 paraphrasing these guys saying: Well, I take care of
7 my kids, I do this, I do that, I do the other.

8 And his response was: What do you want,
9 a cookie? That's what you're supposed to do. Okay.

10 So we have cookies. But you don't get
11 it for doing your job. You get it because having
12 cookies is good.

13 So please, I could have said no -- well,
14 I probably couldn't have said no to Chief Judge
15 Linares when he called me. But that's why I'm here.

16 **MR. BRESS:** Thank you, your Honor. We
17 appreciate that.

18 Your Honor, the fundamental submission I
19 want to make to you today is that if the proper legal
20 standards are actually applied to the motion that the
21 plaintiffs filed, that motion fails.

22 **SPECIAL MASTER:** Okay. Is the standard
23 any different than I just articulated to Mr. Assaf?

24 **MR. BRESS:** So here are the key
25 elements. You have to identify documents that are in

Page 213

1 furtherance of a crime or fraud. And the in
2 furtherance of standard has real meaning.

3 There was some allying of what that
4 standard actually means. And I think it's very
5 important to crystallize what it actually does
6 include and what it doesn't include.

7 But the documents have to be in
8 furtherance of a crime or fraud. There has to be
9 client's wrongful intent. This is another
10 significant point that I think was much allied in the
11 presentation you heard.

12 **SPECIAL MASTER:** Let me take you back to
13 the prior element --

14 **MR. BRESS:** Sure.

15 SPECIAL MASTER -- which the in
16 furtherance of. What do you say in respect of
17 plaintiffs' argument that under the New Jersey
18 statute it's in aid of and not in furtherance of and
19 does that make a difference?

20 **MR. BRESS:** Your Honor, I would say
21 exactly what you said before, which is that in aid of
22 means in furtherance of.

23 The in furtherance of standard has
24 existed in the common law for the better part of a
25 120 to 150 years. There are case after case after

Page 214

1 case that say the standard is in furtherance of, in
2 distinction to two other standards that proponents of
3 the crime fraud exception have often argued for,
4 which is the documents merely have to be related to
5 or they have to be evidence of a fraud.

6 I think that when you look at what the
7 plaintiffs are arguing, it appears today they
8 accepted the in furtherance of standard.

9 I can tell you when you read their
10 brief, they have been strenuously opposing the in
11 furtherance of standard.

12 And as your Honor knows, we've been at
13 this for a long time, not just here.

14 The distinction between the these three
15 standards, in furtherance of, related to, and
16 evidence of, matters massively.

17 In aid of is in furtherance of. In aid
18 of is an active term. It means advance, just like in
19 furtherance means.

20 And how do we know that in the context
21 of New Jersey law? We know it from the Fellerman
22 case.

23 We have six slides, your Honor, so that
24 I think gives you some indication --

25 **SPECIAL MASTER:** Including the cover

1 slide or --

2 **MR. BRESS:** Seven slides.

3 **SPECIAL MASTER:** Okay.

4 **MR. BRESS:** Ronny, if you could pull up
5 slide 4, this is the New Jersey Supreme Court quoting
6 at the top the in aid of language and then after the
7 block quote construing it to mean in furtherance of.

8 In furtherance of means in aid of. When
9 that statute was passed in 1960, New Jersey had a
10 crime fraud exception for the better part of probably
11 70 to 80 years based on the reported cases. And the
12 understanding always was a more active commission of
13 a fraud in furtherance of.

14 And you have the Third Circuit, your
15 Honor, that has said the exact same thing. And we
16 can turn to slide 1, which is In re: Grand Jury
17 Subpoena from the Third Circuit, 2014. In
18 delineating the connection required between the
19 advice sought and the crime or fraud, we have
20 repeatedly stated that the legal advice must be used
21 in furtherance of the alleged crime or fraud. We
22 have rejected the more relaxed related to standard
23 and explained that the legal advice must give
24 direction for the commission of future crime or
25 fraud.

Page 216

1 And what you see repeatedly in the case
2 law is the client has to be intending the crime or
3 fraud at the time of the communication.

4 **SPECIAL MASTER:** Can I ask you though --

5 **MR. BRESS:** Sure.

6 **SPECIAL MASTER:** -- is In re: Grand Jury
7 Subpoena interpreting the New Jersey statute?

8 **MR. BRESS:** It is not, your Honor. But
9 if you go again to slide 4, we have Fellerman, the
10 New Jersey Supreme Court interpreting the New Jersey
11 statute treating in furtherance of and in aid of as
12 the same thing.

13 And if you look at the next slide, which
14 is a case called Sunshine Biscuits from the Appellate
15 Division, here I would say the in furtherance of --
16 obviously you see the phrase in furtherance of, but
17 actually when you look at the case, you can see the
18 work that the standard is doing, because in that case
19 at time one you have in an in-house counsel who
20 drafts a memo that says there was no contract between
21 the plaintiff and the defendant.

22 Fast-forward three years. There's
23 litigation over this issue. And the defendant takes
24 the legal position that there was no contract.
25 Meanwhile, this in-house clearly privileged memo gets

Page 217

1 produced inadvertently. And the plaintiff sees it
2 and says: Aha, you've been lying to me. In fact,
3 there was a contract and you said in this privileged
4 memo that there was a contract.

5 What the Appellate Division says is that
6 document is not discoverable under the crime fraud
7 exception because it doesn't suggest that the
8 development of false information or facts. And it
9 goes on to say it's not discoverable even though this
10 affirmative defense is arguably inconsistent with the
11 legal position embodied in the memo.

12 And the reason why I put this up and why
13 it's so significant is that if the legal standard
14 were related to, the in-house counsel's memo was
15 clearly related to this later allegation of fraud.

16 **SPECIAL MASTER:** But plaintiffs haven't
17 argued related to. They have not argued --

18 **MR. BRESS:** I would submit they --

19 **SPECIAL MASTER:** Not in those terms.
20 They have argued that in aid of is far broader than
21 in furtherance of and therefore it is a larger
22 catch-all than just in furtherance of.

23 Isn't that really what they've argued?

24 **MR. BRESS:** Well, I can't say I have
25 that clarity on what they argued, because in their

Page 218

1 opening brief they said the standard is not in
2 furtherance of. I don't think they identified what
3 they thought the standard actually was.

4 **SPECIAL MASTER:** Agreed.

5 **MR. BRESS:** Then when you get to the
6 reply brief, they say it's not in furtherance of,
7 it's in aid of.

8 But, your Honor, there is not a single
9 case that I'm aware of that has said in aid of means
10 something different than in furtherance of.

11 And the in aid of formulation, which was
12 enacted in New Jersey law in 1960, is based on a set
13 of model evidentiary rules that were developed in the
14 50s. And some states do have the language aid of.

15 And I'm not aware of and plaintiffs
16 certainly haven't cited any case that said that aid
17 of means something different than in furtherance of.

18 But to your point on the related to,
19 when Mr. Placitella puts up a slide that says here
20 are the documents on the privilege log that have the
21 word Martin in it, therefore you should review them
22 in camera, that at best is a related to analysis.
23 That's all it is, because there's no suggestion that
24 any of those documents are in furtherance of, much
25 less that they reflect the client's intent to have a

Page 219

1 crime or fraud be committed by their lawyers.

2 But going back to Sunshine Biscuits,
3 your Honor, I think if the standard was related to,
4 that document should have been produced. And
5 certainly if the standard was evidence of, the
6 document definitely should have been produced,
7 because clearly the earlier in-house counsel's memo
8 was some evidence of this supposed later fraud.

9 And what you heard Mr. Placitella argue
10 today was what the crime fraud exception covers is
11 essentially the truth that proves the lie.

12 That's not how the crime fraud exception
13 works. The crime fraud exception is a much more
14 circumscribed, articulated exception with
15 specifically defined elements.

16 One of those is you must have
17 demonstrated a key timing component, which is that at
18 the time of the communication the clients intended to
19 misuse legal services in furtherance of a crime or
20 fraud.

21 I don't think, although the plaintiffs
22 seem to be finally acknowledging that perhaps the
23 standard is in furtherance of, there is a reason why
24 the plaintiffs did not argue in their brief that
25 that -- they didn't embrace the standard that

Page 220

1 literally hundreds of courts have adopted. They
2 didn't embrace the standard that the New Jersey
3 Supreme Court has articulated and that the Appellate
4 Division here applied, because I think they have to
5 realize that there are not -- there is not a good
6 faith basis to argue that any of the documents on the
7 privilege log are in furtherance of a crime or fraud.

8 And this is, by the way, your Honor,
9 part of the prima facie case. We can go to slides 2
10 and 3. I've put up here Chevron. And if you look,
11 your Honor, it's talking about the prima facie case
12 and the key element number 2, the attorney/client
13 communications were in furtherance of that alleged
14 crime or fraud.

15 And if you look at the next slide, your
16 Honor --

17 **SPECIAL MASTER:** Well, again, let me
18 take you back to that.

19 **MR. BRESS:** Sure.

20 **SPECIAL MASTER:** Chevron did not apply
21 the New Jersey statute.

22 **MR. BRESS:** Well, but this, your Honor,
23 I think is --

24 **SPECIAL MASTER:** That's a yes or no.

25 **MR. BRESS:** Yes, it did not.

Page 221

1 **SPECIAL MASTER:** Okay.

2 **MR. BRESS:** But I was about to respond
3 that it doesn't make a difference, because I don't
4 think the Third Circuit law on the crime fraud
5 exception is any different than the New Jersey law.

6 **SPECIAL MASTER:** Well, plaintiffs are
7 arguing that it is. Plaintiffs are arguing that the
8 unique use of words in the New Jersey statute renders
9 it incompatible with the argument that in furtherance
10 of is the standard. That's their argument. Whether
11 it's right or wrong, that's for a later day. But
12 that is but their argument, that the language of the
13 statute means something other than in furtherance of.
14 And they say it by saying: Look at the exact words,
15 and if the legislature had intended to have it say in
16 furtherance of, they would have used those words, and
17 they did not, particularly in light of all of these
18 other cases all over the universe that use the in
19 furtherance of formulation, but New Jersey does not.
20 So there must be a reason we have different language
21 in New Jersey than everybody else does. That's
22 their argument.

23 **MR. BRESS:** Yes, that is their argument.
24 But the point I want to work up here with, your
25 Honor, is that that argument is clearly not correct.

Page 222

1 And the reason I say that is because
2 there is no basis to believe that New Jersey alone
3 among every state in the country, alone among every
4 federal circuit court of appeal somehow has a
5 different standard for the crime fraud exception.

6 I don't think that's borne out in any
7 New Jersey case. I think it's contradicted by the
8 New Jersey cases. It's contradicted by Fellerman,
9 which equates the two, much as your Honor did. And I
10 think dictionaries and legal thesauruses would show
11 us the same thing. And it is contradicted by
12 Sunshine Biscuit. And there are other cases as well
13 that use the phrase in furtherance of.

14 But the point I also want to make, your
15 Honor, is that I think this is a question for today.
16 It's not a question for later. It's a question for
17 today because to state a prima facie case you need to
18 be able to put forward evidence that would be
19 sufficient to meet the actual elements of the crime
20 fraud exception.

21 And the problem I have with plaintiffs'
22 submission is that they're seeking to avoid what is a
23 central element here, which the in furtherance of
24 test.

25 And I don't see how you can state a

Page 223

1 prima facie case when you misarticulate the legal
2 standards that apply and then when you don't put
3 forward the proof that would sustain the actual legal
4 requirements.

5 So in our view, the in furtherance of
6 standard is -- in aid of, in furtherance of, it's the
7 same thing, and that by not embracing that standard
8 and explaining how it could be met and by not
9 identifying any particular documents that would be
10 met under the standard, the prima facie case fails.

11 **SPECIAL MASTER:** Okay. But Mr.
12 Placitella at one point conceded that even if you
13 applied the in furtherance of standard, there is more
14 than enough in this record to satisfy the prima facie
15 showing that they are required to do so.

16 And in order to demonstrate that, he
17 marshaled a whole bunch of facts. Now, of course,
18 interpreting them in the light most favorable to
19 him -- I shouldn't say to him -- to his clients. But
20 he did marshal a whole bunch of facts.

21 Now, whether those facts deserve the
22 interpretation that is being advanced or they deserve
23 some other different interpretation is something that
24 we're going to have to address at some point or
25 another.

Page 224

1 But isn't it fair to say that based upon
2 the entire presentation that's been made, that at the
3 very least there's been a sufficient showing by a
4 fair preponderance of the evidence that there is a
5 reasonable basis, a reasonable factual basis for a
6 good faith belief that the exception would apply?

7 Which then takes us to step 2, which is
8 the actual in camera ex parte review of the documents
9 themselves.

10 **MR. BRESS:** Let me respond. I don't
11 think that's correct. And I think here are the
12 reasons why.

13 The presentation that you saw this
14 morning, and Mr. Farrell is going to respond
15 point-by-point to some of these slides and I think
16 you're going to see a somewhat different version of
17 the facts than you heard this morning. But set that
18 aside.

19 What Mr. Placitella came forward with
20 was evidence that he believes shows a fraud.

21 What the cases say is that a showing of
22 fraud, even a compelling one, is not enough to
23 satisfy the crime fraud exception. Simply because
24 you plead a fraud or even if you prove a fraud in
25 front of a jury doesn't mean you then get to take the

Page 225

1 privileged documents. This is a completely separate
2 inquiry.

3 And so I think at most --

4 **SPECIAL MASTER:** But let's deal with
5 that. Let us say for purposes of argument that the
6 plaintiffs have established the existence of a fraud
7 or a crime. Okay.

8 **MR. BRESS:** We disagree, but I'll accept
9 the premise.

10 **SPECIAL MASTER:** I expect no less from
11 you. But let's assume for the sake of argument that
12 the plaintiffs have established a prima facie case
13 that a crime or fraud has been committed.

14 They then point to a number of
15 communications that in their view were -- and I'm
16 going to use what I think is the correct
17 nomenclature -- that were in furtherance of the crime
18 or fraud.

19 And they then say that based upon their
20 proofs, which they claim are actually greater than by
21 a fair preponderance of the evidence, that the second
22 stage needs to be addressed, which is the actual
23 review of the documents themselves.

24 I'm not going to go into the and you
25 should be able to review the documents themselves to

Page 226

1 establish the prima facie case because that strikes
2 me as putting the cart before the horse.

3 **MR. BRESS:** That's not correct, yes.

4 **SPECIAL MASTER:** But what's wrong with
5 that?

6 **MR. BRESS:** So I think there are several
7 things that are wrong with it. We haven't even
8 identified what fraud we're talking about here. I
9 don't think that based on the submission we have seen
10 today --

11 **SPECIAL MASTER:** I can tell you what
12 fraud has been identified here.

13 **MR. BRESS:** Well, the point I was going
14 to make, your Honor, was the spoliation point,
15 because I really do think that has to be off the
16 table at this point when what was put forward in an
17 opening brief were allegations of document
18 destruction and the Hemstock, quote/unquote, purge
19 memo that doesn't actually call for the destruction
20 of documents.

21 We responded to this allegation of fraud
22 by saying: How can you allege and claim you should
23 be entitled to our privileged documents based on
24 spoliation when you haven't identified any document
25 that was destroyed or missing, which is what led to

Page 227

1 Appendix C, which we have had no opportunity to
2 respond to.

3 And so if we're are talking about the
4 misstatements, I understand the -- I understand your
5 Honor's point. I don't think that spoliation issue
6 has been properly set up in front of your Honor.

7 But to get back to --

8 **SPECIAL MASTER:** Well, let's not go too
9 far off of that. Are you okay if you're allowed a
10 reasonable opportunity to respond to the spoliation
11 arguments?

12 **MR. BRESS:** Your Honor, I think that if
13 there's going to be further proceedings in the case,
14 there's going to need to be further submissions to
15 your Honor, and part of that would include --

16 **SPECIAL MASTER:** Is that a yes?

17 **MR. BRESS:** Yes. Clearly, yes.

18 **SPECIAL MASTER:** All right. I know it's
19 your way of arguing. But for me it's a lot more
20 helpful if you give me the conclusion up front and
21 then do the argument.

22 So if I ask you a question that's a yes
23 or no question, you can say yes and then continue.
24 But at least I know -- or no. At least I know how to
25 cabin in what you're saying to me.

1 **MR. BRESS:** Yeah, I apologize.

2 **SPECIAL MASTER:** Don't bury the lead.

3 **MR. BRESS:** It was so obvious to me that
4 the answer was yes. But yes.

5 **SPECIAL MASTER:** I'm not that smart.
6 So you have to help me here.

7 **MR. BRESS:** Yes a thousand times. But
8 I still, your Honor, don't think that really remedies
9 the situation, because here we're talking about a
10 prima facit case. All we have to go on is the
11 plaintiffs' showing. And if the plaintiffs in their
12 reply brief made -- essentially sandbagged us with 45
13 pages of briefing that we didn't have a chance to
14 respond to --

15 **SPECIAL MASTER:** And I cured the
16 sandbagging. So what's your complaint? If I cure
17 the sandbagging, you don't have a complaint.

18 **MR. BRESS:** Well, I think what would
19 happen then, your Honor, is we should be allowed to
20 respond to that before your Honor makes a
21 determination on the prima facie case.

22 **SPECIAL MASTER:** I should think so.

23 **MR. BRESS:** Yeah.

24 **SPECIAL MASTER:** As much as I don't like
25 it, I should think that that would be -- I think

Page 229

1 that the plaintiffs have a choice to make. They
2 have a choice to either withdraw their spoliation
3 arguments and allow me to decide this on the record,
4 or they can maintain their spoliation arguments,
5 which means that you will get the opportunity to
6 respond. They will not get an opportunity to reply.
7 It will be in the nature of a sur-reply, which the
8 rules are not in favor of, but I'd be happy to
9 give -- if that's the case, be happy to give to you
10 leave to respond to a 44 page appendix to a brief
11 that, if folks haven't noticed, I'm a little annoyed
12 at. I don't think that that's how things should be
13 done.

14 If you wanted to file a 44 page brief on
15 spoliation, all you had to do was ask. I haven't
16 turned anybody down on anything to this point.

17 So those are the choices it strikes me.
18 Either they can withdraw their spoliation claims.
19 Then there's nothing for respond to. Or they can
20 maintain their spoliation claims, at which point BASF
21 and Cahill will be given the opportunity, a
22 meaningful opportunity to reply. And then I'll rule.

23 **MR. BRESS:** I guess I would say, your
24 Honor, there's to me a third option, which is just
25 simply to disregard the --

Page 230

1 **SPECIAL MASTER:** I'm not going to do
2 that.

3 **MR. BRESS:** -- improper reply.

4 **SPECIAL MASTER:** I'm not going to do
5 that. That's not an option in my book. This is far
6 too important a motion for me to do that. I don't
7 think I would be meeting my obligations here to the
8 Court if I were to do that.

9 **MR. BRESS:** I understand and respect
10 that position, your Honor. I guess my reaction to it
11 is I think it's a position the plaintiffs put you in
12 by not following the proper approach to making a
13 prima facie case.

14 And I think that to have to argue it --
15 we appreciate the opportunity to file a further
16 brief. If that's where it goes, we will do that.

17 But point of today was to be able to
18 evaluate the plaintiffs' prima facie case as based on
19 the papers. And I think we're at a disadvantage by
20 not having those responses for --

21 **SPECIAL MASTER:** Let me interrupt you
22 for a moment.

23 Mr. Placitella, what choice do you want?

24 **MR. PLACITELLA:** I would consult with my
25 brethren here before --

1 **SPECIAL MASTER:** Why don't you do that
2 right now. Take a minute and do that. I'm concerned
3 that you may turn into a pumpkin on me.

4 **MR. PLACITELLA:** No, I'm good. I took
5 care of it.

6 **SPECIAL MASTER:** Let's get it done.
7 We'll go off the record for a minute.

8 (Break.)

9 **SPECIAL MASTER:** Are we ready?

10 **MR. ROTH:** Yes, your Honor.

11 **SPECIAL MASTER:** Mr. Placitella, you got
12 something to report?

13 **MR. PLACITELLA:** Yeah, we had a --

14 **MR. ROTH:** Well, I think -- I'm not sure
15 what your last question was, your Honor. I think you
16 said are we dropping the spoliation claim --

17 **SPECIAL MASTER:** My last question was
18 are you ready to proceed?

19 **MR. ROTH:** Before we went off the
20 record, your Honor.

21 **SPECIAL MASTER:** The choice is simple.
22 Either withdraw your spoliation issue or agree to the
23 filing of a sur-reply brief.

24 **MR. ROTH:** So we will agree to the
25 filing of the sur-reply brief.

Page 232

1 **SPECIAL MASTER:** Okay.

2 **MR. ROTH:** And perhaps there's an issue
3 to be framed here based on the argument especially as
4 it relates to the crime fraud that we've heard today.

5 Perhaps after everybody's done, I'll
6 have an opportunity to address that, rather than
7 interrupt.

8 **SPECIAL MASTER:** I don't understand that
9 at all.

10 **MR. ROTH:** Yeah, I've been doing that to
11 everyone here.

12 **SPECIAL MASTER:** Well, that should tell
13 you something.

14 **MR. ROTH:** For purposes of whether we've
15 established a prima facie case for the crime fraud,
16 we've identified evidence, even in the publicly
17 non-privileged arena, evidence that was concealed
18 from plaintiffs in their underlying cases that the
19 defendants Cahill and Engelhard knew about.

20 You and Mr. Placitella had a discussion
21 about is that spoliation if they were destroyed or
22 not destroyed.

23 And for purposes of crime fraud prima
24 facie case, it doesn't matter whether they were
25 destroyed or not. They were concealed and not

1 available, which your Honor defined as spoliation.

2 And we agree that for purposes of this
3 motion that was spoliation.

4 Where we get to the appendix that we
5 filed, and I can't remember, Judge, how many pages it
6 was --

7 **SPECIAL MASTER:** It's 44, just in case
8 you forgot.

9 **MR. ROTH:** We were responding to an
10 assertion in a reply brief that said: You never
11 identified documents that were destroyed. There are
12 other reasons why that may be relevant in this case.

13 There was talk before about Rosenblit
14 damages. And there was an argument to be made that
15 the fact that some of those documents have been found
16 or could be found show that they could have been made
17 available to the plaintiffs in the underlying cases.

18 But those in our view are two distinct
19 elements of this lawsuit.

20 But for purposes of the crime fraud
21 argument, I think we've established spoliation in
22 terms of the documents that are concealed.

23 Appendix C, however, we don't want to
24 run the risk -- sorry. Appendix E, the 44 page one.
25 Sorry. We didn't want to run the risk of waiving any

Page 234

1 claim by saying no, we're not pursuing spoliation
2 when, as we've discussed, it's an important part of
3 our prima facie showing.

4 So it is confusing. I don't know
5 whether I've made matters clearer. But you've asked
6 for an answer and we said, yeah, we'll accept the
7 sur-reply.

8 **SPECIAL MASTER:** Okay. What's that do
9 for you, Mr. Bress? You good?

10 **MR. BRESS:** Yes. We will submit a
11 sur-reply, your Honor, and then --

12 **SPECIAL MASTER:** Can you tell me by
13 when?

14 **MR. BRESS:** We would like three weeks on
15 the sur-reply. And we would like 60 pages.

16 **SPECIAL MASTER:** I'm sorry?

17 **MR. BRESS:** We'd like 60 pages and three
18 weeks.

19 **MR. PRATTER:** We had 44 pages. Where do
20 they get 60?

21 **SPECIAL MASTER:** Well, because they
22 asked for it. You didn't. You asked for 35 and
23 gave me a hundred.

24 **MR. BRESS:** Your Honor, I can explain to
25 you why.

Page 235

1 **SPECIAL MASTER:** Mr. Bress, you don't
2 have to explain why. I assume that any lawyer t who
3 makes that request does it in a good faith basis and
4 has a reason for it. So we're talking about --

5 **MR. GUSSACK:** Your Honor, may I have a
6 moment to confer with my co-counsel as to timing?

7 **SPECIAL MASTER:** Sure.

8 **MS. GUSSACK:** As you can appreciate,
9 we're a little bit newer. And I want to make sure
10 three versus four weeks, which makes sense for us.
11 If I might have a minute.

12 **SPECIAL MASTER:** Absolutely.

13 **MR. GUSSACK:** Thank you.

14 **SPECIAL MASTER:** The only thing I have
15 to give folks a heads-up is I'm going to be out part
16 of April and may fly into May. I'm having a medical
17 procedure done that I just found out I'm going to be
18 out of commission for two weeks. I did not expect
19 that. And it's going to be sometime in April. And
20 I'd like to get this done before that. So if you
21 could bear that in mind.

22 But, Miss Gussack, please do talk to
23 these folks and come up with a date.

24 **MR. GUSSACK:** Thank you.

25 **MR. PLACITELLA:** I want to be heard on

Page 236

1 the date before they...

2 **MR. BRESS:** Your Honor, if it would be
3 okay with the Court, we would suggest March the 21st.

4 **SPECIAL MASTER:** March the 21st, that's
5 a Wednesday. March the 21st it is.

6 **MR. PLACITELLA:** Could I be heard on
7 this, your Honor?

8 **SPECIAL MASTER:** Yes. But I'm not going
9 to pay much attention to it.

10 **MR. ROTH:** I know that.

11 **SPECIAL MASTER:** Okay. This is
12 something of your own making as far as I'm concerned,
13 Mr. Placitella.

14 **MR. PLACITELLA:** Well, okay.

15 **SPECIAL MASTER:** But whatever you want
16 to tell me, I'll be happy to listen to it.

17 **MR. PLACITELLA:** If that's how it's
18 going to get extended as the Court suggests, then
19 we're going to have to have a conversation about the
20 discovery end date, because a lot of what was going
21 to transpire may be impacted by that. That's my
22 point.

23 **SPECIAL MASTER:** I appreciate that, that
24 there might be. What I'm going to suggest to you is
25 don't let it, the best you can. If it does, come

Page 237

1 back to me and we can talk.

2 But I will tell you that my uninformed
3 reaction is no, it's not going to affect the
4 discovery end date.

5 I don't hear the defense saying that
6 they need the discovery end date extended. And the
7 need for this sur-reply was the result of plaintiffs'
8 actions.

9 So, you know, you don't get to kill your
10 parents and then seek clemency because you're an
11 orphan.

12 You wanted how many pages?

13 **MR. BRESS:** 60, your Honor.

14 **SPECIAL MASTER:** Do you need 60?

15 **MR. BRESS:** I believe we do in these
16 circumstances.

17 **SPECIAL MASTER:** You do know I read each
18 one, right?

19 **MR. BRESS:** I've seen evidence of that,
20 your Honor.

21 **SPECIAL MASTER:** I'm not getting my
22 younger either. Any appendices you want you to do?
23 No appendices?

24 **MR. BRESS:** Your Honor, I think everyone
25 here has probably heard your directive on appendices.

Page 238

1 **SPECIAL MASTER:** Okay. So you get
2 until March 21st. Is this going to be a consolidated
3 brief between Cahill and BASF or --

4 **MS. GUSSACK:** No, your Honor.

5 **SPECIAL MASTER:** -- are you going to do
6 separate?

7 **MR. GUSSACK:** Separate, your Honor.

8 **SPECIAL MASTER:** Okay. Miss Gussack,
9 do you also want 60 pages?

10 **MR. GUSSACK:** I'd like to bring it in
11 under 60, your Honor.

12 **SPECIAL MASTER:** I know you would.

13 **MS. GUSSACK:** But I'll hold it at 60 for
14 now.

15 **SPECIAL MASTER:** Okay. So does that
16 help you there, Mr. Bress?

17 **MR. BRESS:** Yes, I think we have that
18 issue resolved, your Honor.

19 **SPECIAL MASTER:** Okay. And I know I
20 kind of cut you off in the middle of your
21 presentation. Is there something else that you'd
22 like to bring to my attention?

23 **MR. BRESS:** Your Honor, I want to --
24 where we began this part of the conversation was
25 comments that you made to the effect that you have

Page 239

1 seen a lot of facts put up on the screen, isn't that
2 enough for a prima facie case? I responded on the
3 spoliation piece. We've now bracketed that to the
4 side.

5 But I want to come back to your Honor's
6 question and make a few additional points in response
7 to that, because I don't believe that what you saw
8 today does satisfy the legal requirements for a prima
9 facie case.

10 There's two key points I want to make,
11 your Honor, in why there's a deficiency. The first
12 one is the failure to identify specific documents
13 that were subject to the crime fraud exception.

14 **SPECIAL MASTER:** I've cured that.

15 **MR. BRESS:** I don't think so, your
16 Honor.

17 **SPECIAL MASTER:** Why not?

18 **MR. BRESS:** A few reasons.

19 **SPECIAL MASTER:** I've got an Appendix C
20 that has all sorts of Bates numbered documents that I
21 asked counsel and they said do two things. Number 1,
22 they are the documents that they assert assist in
23 proving their prima facie case.

24 And secondly, they are the documents
25 that they want disclosure on -- or in respect of

Page 240

1 which they want disclosure on, that universe.

2 So why do I need -- other than at some
3 point, if it becomes relevant, I may ask you folks to
4 produce those documents to me ex parte so I can make
5 a determination. But that's only after I get past
6 the prima facie burden.

7 So what more do I need to know?

8 **MR. BRESS:** Your Honor, the central
9 problem with Appendix C is that all it does is list a
10 set of Bates numbers.

11 There has been no showing at all as to
12 how any particular document is in furtherance of a
13 crime or fraud. And that's the legal standard that
14 governs here.

15 **SPECIAL MASTER:** How do they do that if
16 they don't have access to the documents?

17 **MR. BRESS:** They do it with
18 non-privileged evidence, your Honor. In these cases
19 what people need to come forward with is an
20 explanation.

21 There were privileged logs that were
22 flashed up very briefly that we haven't even had the
23 opportunity to respond to. That was the attempt, not
24 Appendix E but C.

25 But the last 10 slides we saw where

Page 241

1 there were red boxes around privilege log entries and
2 certain subject matter, that was an attempt to try to
3 satisfy the relevant legal standard to show that
4 there are particular communications that are in
5 furtherance of the crime or fraud.

6 But when you look at those
7 communications, your Honor, and I think you pointed
8 this out, there are communications that are purely
9 internal to Cahill. There are communications from
10 all sorts of different time periods.

11 **SPECIAL MASTER:** Well, that doesn't mean
12 that it's not a Cahill lawyer telling another Cahill
13 lawyer: Hey, guys, this is how we can really screw
14 all these plaintiffs.

15 We don't know that, do we?

16 **MR. BRESS:** But what we do know, your
17 Honor, is that on the face of the privilege log there
18 is no Engelhard in-house person listed.

19 **SPECIAL MASTER:** Why does there need to
20 be an Engelhard in-house person listed --

21 **MR. BRESS:** Because --

22 **SPECIAL MASTER:** -- if you've got
23 Engelhard's agent talking to another one of
24 Engelhard's agents saying: Hey, these are the things
25 that we can do where we can hide the ball on all of

Page 242

1 these plaintiffs who have no clue that this stuff is
2 like really bad for them, but we're not going to tell
3 them about it.

4 So what? Why isn't that subject to the
5 exception?

6 The problem I have with your argument is
7 it is almost a Major-Major problem from Catch-22.
8 You know, I only talk to you in my office but I'm
9 never in my office.

10 How do they prove the contents of the
11 document if they don't have access to the contents of
12 the document?

13 **MR. BRESS:** Your Honor, let me respond,
14 because I think this is reviewing a fundamental
15 disconnect between what the plaintiffs are asking and
16 what the crime fraud exception is about.

17 The crime fraud exception is not about
18 whether Cahill made misstatements to litigants.

19 The crime fraud exception as applied to
20 these factual circumstances is whether the client,
21 Engelhard and later BASF, intended for its outside
22 counsel to make misstatements in litigation.

23 The fact of a misstatement in a
24 litigation does not trigger the crime fraud
25 exception.

Page 243

1 **SPECIAL MASTER:** Okay. But let me then
2 change the hypo. The hypo then becomes a memo from
3 someone at Cahill to someone else at Cahill -- I'm
4 not saying this happened. Just hypothetically.
5 Someone from Cahill saying to somebody else at Cahill
6 saying: I just got off the phone with John Doe from
7 Engelhard and our instructions are that we are to
8 deep-six all this information about asbestos and we
9 are to represent to whomever it is that there is no
10 evidence of any asbestos anywhere in this universe.

11 Okay. Doesn't that -- but in order to
12 get to that, don't I have to see what the document
13 says?

14 **MR. BRESS:** No, because otherwise there
15 would be a prima facie case in every single case.

16 **SPECIAL MASTER:** But that's separate and
17 apart from whether they've made a prima facie case.

18 Their prima facie case is -- I guess the
19 distinction -- the disconnects that you and I are
20 having is the distinction between direct and
21 circumstantial evidence.

22 You're looking for direct evidence to
23 satisfy the prima facie case. I'm looking at the
24 establishment of the prima facie case no matter
25 whether the evidence is direct or circumstantial.

Page 244

1 And the presentation that Mr. Placitella
2 made was largely circumstantial, but it did have some
3 direct evidence, because he had -- at least he
4 pointed out to what he said were statements made by
5 Mr. Hemstock, by -- I'm sorry, Dr. Hemstock, Mr.
6 Gale, Dr. Glassley, that all led you to the
7 conclusion that whatever the representations may have
8 been, they were incorrect, that in fact there was
9 asbestos in this talc based upon their review of it.

10 And we know objectively that BASF
11 through its counsel made representations to the world
12 at large that the Emtal talc did not contain asbestos
13 and that there was no proof that it did or it didn't.

14 Well, the plaintiffs' job is almost
15 impossible, because they have to prove a negative.
16 And the only way you can prove the negative is by
17 proving the absence of the positive, which is always
18 circumstantial.

19 So I'm not on the same page as you,
20 because I'm looking at what the plaintiffs have
21 presented through a very different prism than you
22 are, probably a much more -- I'm trying to find the
23 right word -- indulgent prism than you are.

24 **MR. BRESS:** So let he respond, your
25 Honor.

Page 245

1 **SPECIAL MASTER:** Please.

2 **MR. BRESS:** I think the problem here is
3 that the central element of the crime fraud exception
4 is the client's wrongful intent.

5 What the plaintiffs are asking your
6 Honor to do, what their position is, is that there
7 was an ongoing fraud from the 70s all the way until
8 2009.

9 They've now disavowed the allegation
10 that BASF intended to commit a crime or fraud, which
11 I clearly think is outrageous. But they're asking
12 your Honor -- in those 66 documents that they want
13 your Honor to review, there are documents spanning
14 the 70s to the late 2000s. There are allegations --
15 sprawling allegations of fraud being made without any
16 evidence of what individual people knew and were
17 aware of.

18 You saw put up on the screen Mr.
19 Hassett, an in-house lawyer. There is not any
20 allegation -- they haven't deposed Mr. Hassett. They
21 haven't done the work to bring to your Honor the
22 non-privileged record that people do before they
23 bring this kind of motion.

24 And the reason they haven't done that
25 work, your Honor, is because they were banking on the

Page 246

1 Samson results.

2 And that is why this crime fraud motion
3 wasn't even filed until your Honor prompted the
4 plaintiffs to file a class motion, to which they
5 responded: Well, we now need to file a crime fraud
6 motion.

7 **SPECIAL MASTER:** That's not exactly
8 correct. They filed a crime fraud motion because I
9 ordered them to.

10 **MR. BRESS:** Well --

11 **SPECIAL MASTER:** That's why they filed.
12 Otherwise they would not have filed it, or at least
13 not yet.

14 **MR. BRESS:** The reason this all came
15 about at the time it did and not years earlier in
16 this long-running case is because your Honor directed
17 the plaintiffs to file a class motion. And they
18 claimed that as part of the class proceedings they
19 needed the privileged documents.

20 And you said to them: Well, if you need
21 the privileged documents, then --

22 **SPECIAL MASTER:** Tee it up.

23 **MR. BRESS:** -- file a motion. But the
24 whole arc of this was not the plaintiffs going to
25 depose people on a non-privileged basis and bring the

Page 247

1 record to your Honor so that you could try to make a
2 conclusion that there was a prima facie case that the
3 client intended a crime or fraud.

4 And I think the time period we're
5 talking about is enormous. There's an allegation
6 being made of 30 years' worth of crime or fraud.

7 And I think you have to break that
8 period up and look at the different considerations,
9 because I think these time periods are quite
10 different.

11 And let's start with the first one,
12 which is basically --

13 **SPECIAL MASTER:** But isn't that your
14 argument at the ex parte in camera portion?

15 **MR. BRESS:** I don't think so, your
16 Honor, because I think it goes to the failure to
17 identify any documents in furtherance of a crime or
18 fraud or that reflect the client's wrongful intent to
19 misuse legal services in furtherance of a crime or
20 fraud.

21 And if you look at the period from say
22 the 70s up until the time of Westfall, that's what
23 I'll what call the first period, when the plaintiffs
24 claim that misrepresentations were being made to the
25 customers, that's not true. And Mr. Farrell will

Page 248

1 walk through some of that. It is just not accurate.

2 But let's assume it is accurate. In
3 what way was a lawyer involved in furthering that
4 alleged fraud on customers, who by the way, aren't
5 even plaintiffs in the case?

6 There is no identification of any lawyer
7 who was involved in furthering a fraud. Cahill
8 Gordon didn't even represent BASF in the talc cases
9 until 1982.

10 So why are privileged documents on a
11 privilege log from the 70s -- in the late 70s and the
12 early 80s at issue?

13 We don't think there's been any showing,
14 any evidentiary showing to your Honor that that time
15 period could be put at issue.

16 And again, there's the Third Circuit --
17 **SPECIAL MASTER:** How do I know that
18 without looking at the documents?

19 **MR. BRESS:** Your Honor, because there's
20 not even any evidence put before you that would --
21 who is -- who are the lawyers involved in
22 perpetrating a crime or fraud in the late 70s?

23 The fraud that has been articulated to
24 your Honor has been Cahill Gordon. The allegation is
25 that in the late 1980s, when Cahill was defending

Page 249

1 cases on behalf of Engelhard, it made misstatements
2 in litigation.

3 Cahill wasn't even involved in what
4 happened in the 1970s. They weren't even on the
5 scene working on talc cases.

6 So what is the evidentiary basis that
7 would put at issue the client's wrongful intent?

8 And again, we could agree for argument
9 purposes, although it's not true, that there were
10 misstatements.

11 Well, all that shows is that somebody
12 can plead a fraud. I'm talking about the 1970s and
13 the customer disclosures and the MSDS and things like
14 that. All that shows is that if somebody wants to
15 come in and make the argument that those statements
16 were wrong, they can do that.

17 It's a completely different thing to be
18 able to bootstrap that into the privileged documents
19 without any evidentiary basis for the misuse of legal
20 services during that time period.

21 There's no allegation that lawyers were
22 involved in perpetrating a wrongful statement to a
23 customer base.

24 **SPECIAL MASTER:** Well, that's not
25 entirely correct. There are allegations that

Page 250

1 lawyers were involved, because lawyers are party
2 defendants in this case. They're not party
3 defendants because of their good looks, charm, and
4 wit. They're party defendants because it is alleged
5 they engaged in actions that were improper. Okay.
6 Not yet proven. Alleged.

7 And for purposes of trying to pierce the
8 attorney/client privilege, it is the plaintiffs'
9 burden to demonstrate by a fair preponderance of the
10 evidence that there is a reasonable basis to believe
11 that the actions of the lawyers and the clients were
12 such that they were engaged in crime or fraud and
13 therefore the information should not be privileged.
14 That's what we're facing. Okay.

15 But to say that there's nothing here
16 that tells us that there's some underlying
17 impropriety, well, there are the allegations in the
18 complaint that are pretty straightforward. There's
19 the marshaling of the facts that Mr. Placitella
20 engaged in today.

21 Now, whether one agrees with him or not,
22 he does have his theory and he has presented facts
23 that he believes sustain his theory.

24 I'm not getting your point. I'm just
25 not. And maybe I'm just being super-dense.

Page 251

1 **MR. BRESS:** No, I don't think you are,
2 your Honor, because I think that the catch here is
3 that in order for the crime fraud exception to apply,
4 the client has to be intending to misuse legal
5 services at the relevant time period.

6 And the point I'm trying to make to your
7 Honor is that this is not a story that stayed the
8 same for 30 years by the allegations.

9 What they are alleging is that in the
10 late 70s -- in the 70s there were misstatements to
11 customers. Then there was Westfall. Then there
12 was a gap in litigation. Then there were
13 misstatements to litigants. And then there was a
14 period after that when BASF acquired Engelhard.

15 And the point I'm trying to make to your
16 Honor --

17 **SPECIAL MASTER:** But plaintiffs'
18 argument is those are all of a whole cloth. They
19 are not as distinct as you're pointing them out to
20 be. They're saying this is a pattern and practice
21 that started in the 1970s and continued until 2009.
22 That's what they're saying.

23 And whether the people who were doing it
24 in 2009 had the same scienter that the people who
25 started it in 1970 had is to a large degree

Page 252

1 irrelevant.

2 The issue is you have a pattern and
3 practice, it's been in place, this is why it was in
4 place, and that therefore we should be entitled to
5 say the plaintiffs get access to these otherwise
6 privileged documents. That's their argument.

7 **MR. BRESS:** Yes, but the problem --

8 **SPECIAL MASTER:** Not as elegantly said
9 as Mr. Placitella said it. But that's their
10 argument.

11 **MR. PLACITELLA:** That I would say no to.

12 **SPECIAL MASTER:** Okay. That's not your
13 argument?

14 **MR. PLACITELLA:** No, not as eloquently
15 as you.

16 **MR. BRESS:** Your Honor, the problem --

17 **SPECIAL MASTER:** Flattery will get you
18 everywhere.

19 **MR. BRESS:** The problem I have with that
20 framing of this is that there is not evidence that is
21 going to -- that can be used to support the
22 application of the crime fraud exception across this
23 entire period.

24 We already had Mr. Placitella
25 acknowledge on the record that after BASF acquired

Page 253

1 Engelhard --

2 **SPECIAL MASTER:** In 2006.

3 **MR. BRESS:** In 2006, there was no
4 client's intent. Now --

5 **MR. PLACITELLA:** I didn't say that.

6 **MR. BRESS:** Well, if you're going to
7 make the allegation that BASF intended to commit a
8 crime or fraud --

9 **SPECIAL MASTER:** Mr. Bress, talk to me.

10 **MR. BRESS:** Your Honor, if someone is
11 going to make the allegation that BASF intended to
12 commit a crime or fraud, I think they should do so
13 today with all of us present and identify what the
14 evidence is, because I can tell you the evidence we
15 saw was that in a single privilege log in the Paduano
16 case there was a document that was inadvertently
17 logged and then, when we realized it was not
18 logged -- it should not have been logged, it was
19 produced. Your Honor, that is not a crime or fraud.

20 And so to make the allegation that BASF,
21 after it acquired Engelhard, intended to commit a
22 crime or fraud I think is offensive and incorrect.
23 But the point --

24 **SPECIAL MASTER:** Am I not obliged though
25 to give the plaintiff the benefit of all reasonable

Page 254

1 inferences on the facts that they've marshaled?

2 **MR. BRESS:** No, you're not, because
3 under the crime fraud exception, it's not about
4 allegations. It's about evidence.

5 There is no evidence that BASF after it
6 acquired Engelhard intended to commit a crime or
7 fraud.

8 **SPECIAL MASTER:** But that's a
9 distinction without a difference to me, because BASF
10 acquired Engelhard. It acquired it with all of its
11 warts.

12 **MR. BRESS:** Your Honor, that's a
13 question of successor liability. It's not a question
14 of the crime fraud exception. And here's why,
15 because I think this is a very critical point.

16 Under the crime fraud exception, the
17 client has to have the requisite intent at the time
18 of the legal consultation.

19 **SPECIAL MASTER:** Are you saying that
20 Engelhard did not have the requisite legal intent?

21 **MR. BRESS:** Your Honor, absolutely. Our
22 argument is that Engelhard did not have wrongful
23 intent. But our argument is also that BASF did not
24 have wrongful intent.

25 And you have -- on the privilege log and

Page 255

1 the 66 documents, there are documents from 2008,
2 2009, years after the acquisition.

3 This is why we think they haven't made
4 the prima facie case, because what evidence have they
5 put before your Honor that would suggest any basis
6 that BASF intended to commit a crime or fraud after
7 BASF acquired Engelhard? That is I think a
8 fundamental issue.

9 And it happens on the front end too,
10 your Honor. Why in the 1970s -- what evidence has
11 been brought before your Honor that would show that
12 lawyers, legal services were misused?

13 Let's assume the marketing statements
14 were false. We disagree. Even if they were false,
15 that alone does not trigger the crime fraud
16 exception, because what the crime fraud exception is
17 about is not fraud writ large, but the misuse of
18 legal services in furtherance of that fraud where the
19 client intends that result.

20 And merely putting up a couple of
21 marketing statements from the 70s and claiming
22 they're false without anything more does not get the
23 plaintiffs where they need to be. That's the problem
24 with this motion.

25 I think the same is true with documents

Page 256

1 during the Westfall case. The allegation that
2 they've put forward is that the Westfall case was
3 designed when Engelhard was litigating the cases with
4 Cahill appropriately that the documents were
5 produced, that witnesses testified truthfully about
6 the documents.

7 **SPECIAL MASTER:** But what am I to do
8 with the allegation that, as you just said, in the
9 Westfall case, Engelhard and Cahill were doing what
10 they were supposed to do. They made disclosures, and
11 then they went: Whoops, we got to put an end to this
12 piece of litigation. And part of that has to be that
13 all of this information that we have disclosed needs
14 to get put in a very dark and cold corner, never to
15 be seen again. And in the future, going forward,
16 when the same issue came up, nobody said: Oh, here's
17 the information that was developed in Westfall.

18 That's not what was said. What was said
19 was there's no proof of asbestos in any of the talc,
20 when in fact the information in Westfall proved
21 something different. That's their claim.

22 **MR. BRESS:** Right.

23 **SPECIAL MASTER:** And how do you get
24 around that?

25 **MR. BRESS:** But, your Honor, the problem

Page 257

1 is that's their claim. There's no proof that would
2 support that claim. What they're --

3 **SPECIAL MASTER:** Whoa, whoa. Slow down.
4 Okay. The proof is I read at least the Hemstock and
5 Gale depositions. They're not crystal clear. And
6 they're clearly not as clear as Mr. Placitella would
7 like it to be.

8 But there's enough there where they can
9 say: As of the Westfall case, people were on notice
10 that at least some people thought that the Emtal talc
11 contained asbestos. In what quantities I don't know.
12 In what concentrations I don't know. But there were
13 some people, and not John Does off the street, but
14 people who had a reason to know who thought that that
15 was the case.

16 The Westfall case gets settled with an
17 agreement of confidentiality and a return of all
18 information. That goes off, gets put over here.

19 And then in the future what's being said
20 is: No, there is no such evidence, when in fact it
21 is sitting in the Westfall documents, wherever they
22 may have landed. Okay.

23 You then get to the second Rhode Island
24 case. I forget what the plaintiff's name was.

25 **MR. PLACITELLA:** Martin.

Page 258

1 **SPECIAL MASTER:** Martin. And that
2 plaintiff retains an expert who goes out and does an
3 investigation, comes back with a report that
4 basically says there's asbestos in them there hills.

5 And that case gets settled again with
6 another agreement that we get everything that you
7 have, including your expert's report. And that gets
8 put on the shelf somewhere.

9 In the meanwhile, all of these other
10 cases are developing and they're all being told,
11 because I read any number of letters to that effect,
12 there is no proof of our talc containing any
13 asbestos. Therefore, you should dismiss the case.
14 Some of them went as far as to threaten the
15 imposition of sanctions.

16 Those two sets of facts have a hard time
17 coexisting, unless there's something that connects
18 the two.

19 Plaintiff suggests that what connects
20 the two was the scheme and artifice to defraud that
21 was developed by the defendants in order to shelve
22 all of the information that showed wrongdoing and
23 make assertions that were false so that they could
24 get a litigation advantage. That's their assertion.

25 In order for them to pierce the

Page 259

1 attorney/client privilege, they have to show, at
2 least for my purposes, a prima facie case by a
3 preponderance of the evidence in fact there is a good
4 faith basis to believe that that was the case.

5 Now, whether they've done so or not
6 we'll all find out in due course.

7 But at least for today's purposes, how
8 do you respond to that? You can't just say: Well,
9 they haven't done it. Mr. Placitella spent two
10 hours of my life marshaling his facts. He didn't
11 pull them out of thin air. He had a document for
12 each and every thing that he said.

13 Now, whether I agree with his
14 interpretation of those documents is a different
15 story altogether. But there certainly was some
16 showing today.

17 **MR. BRESS:** Your Honor, the point we are
18 making is that at best the showing is one of fraud.
19 It is not a showing that would allow a prima facie
20 case to be found for the crime fraud exception.

21 And the reason is because the crime
22 fraud exception has more elements than just simply
23 fraud.

24 If you want to take away somebody's
25 privilege, there have to be various other

Page 260

1 requirements that are met.

2 There are many cases that go to trial
3 and someone successfully proves fraud. It doesn't
4 mean at the end of the day there's a jackpot where
5 you then get your route through the privileged
6 documents. They're two very different inquiries.

7 And the central problem we have with the
8 plaintiffs' submission is that they haven't brought
9 forward evidence of a wrongful client intent.

10 There are ways in which they -- it's not
11 up to me how they decide to build their case. But I
12 don't think it can be built based on supposition or
13 based on speculation.

14 **SPECIAL MASTER:** Well, I don't think
15 that that is fair or at least a fair evaluation of
16 what I'm being told, because the way I view it, the
17 way I view plaintiffs' arguments is they say: Look,
18 there was this scheme and artifice to defraud. It
19 was cooked up by BASF and Cahill. Just what they're
20 claiming. I'm not saying any of this is true. And
21 in furtherance of this, this is what they did. So
22 therefore, the communications between them during
23 that period of time must be vitiated because of what
24 they were doing. It's kind of logical.

25 And the problem is I don't know what

Page 261

1 those communications are because I haven't seen them.
2 You have, I hope. But I haven't seen them. And so
3 I don't know if the e-mail from a partner at Cahill
4 to a paralegal at Cahill was: Can you get me the
5 Westfall depositions, as opposed to: I read the
6 Westfall depositions and I think we need to put this
7 in a very dark, dark corner to: By the way, I was
8 thinking about the Westfall depositions, but how
9 about them Yankees?

10 I don't know what it says.

11 **MR. BRESS:** Your Honor, I think that we
12 probably are going to circles, but --

13 **SPECIAL MASTER:** We are going in
14 circles.

15 **MR. BRESS:** And I don't want to belabor
16 these points. I think you have our view of the crime
17 fraud exception. And I do want to -- before we run
18 out of time, I do want to let Mr. Farrell walk
19 through some of these slides, because I think that's
20 an important thing for your Honor to see.

21 **SPECIAL MASTER:** I'm here for however
22 long you need. But Mr. Placitella --

23 **MR. PLACITELLA:** I changed.

24 **SPECIAL MASTER:** You okay?

25 **MR. PLACITELLA:** Yeah.

Page 262

1 **SPECIAL MASTER:** It's taken care of?

2 **MR. PLACITELLA:** Yes, your Honor. Thank
3 you.

4 **SPECIAL MASTER:** All right. Well, I
5 will say to you again, I thought that was more
6 important than what we're doing here.

7 Mr. Farrell, you are now their last
8 great hope.

9 **MR. FARRELL:** Thank you for setting
10 appropriate expectations, your Honor.

11 **SPECIAL MASTER:** Don't feel any pressure
12 now.

13 **MR. FARRELL:** The issue that I wanted to
14 speak to you were all the slides that you saw this
15 morning from Mr. Placitella concerning the supposed
16 fraud.

17 You heard Mr. Bress speaking to were
18 there lawyers involved in the fraud and the absence
19 of a connection between the alleged fraud and legal
20 advice and legal advice in furtherance of fraud.

21 The issue I wanted to come back to is
22 whether there's been any fraud actually proven.

23 And I think what you saw this morning
24 actually underscores the problems that we've been
25 trying to identify for some time in plaintiffs'

Page 263

1 theory of this case, because I really do think it's a
2 theory.

3 Your Honor will remember our very first
4 introduction on October 26th, 2017. I think that --

5 **SPECIAL MASTER:** I've tried very hard to
6 forget it. But that's okay.

7 **MR. FARRELL:** I think that issue number
8 1 on the agenda that day was science day. We had
9 filed a motion months earlier asking for a science
10 day. And that motion was still caught up in papers.
11 It hadn't been fully resolved. And I believe Mr.
12 Assaf was explaining to you why we thought that
13 science day was so important.

14 And what your Honor saw this morning
15 illustrates again why the science day is important
16 and how it relates to all of the issues that you've
17 been hearing about this morning, not just the testing
18 records in the 1970s, but frankly why there was a
19 reasonable basis in the minds of lawyers and others
20 in the 80s and the 90s and the 2000s for statements
21 that were made.

22 Your Honor has been identifying the
23 point: Well, can't I make the reasonable inference
24 from the documents that Mr. Placitella showed me this
25 morning that there was fraud and that there was a

Page 264

1 crime of fraud?

2 And I would submit to your Honor there
3 is no reasonable inference to be made along those
4 lines because the very documents he showed you
5 undercut the point he's trying to make.

6 He would show you paragraph 1, and then
7 when you look at paragraph 2, it actually contradicts
8 the point that's made. We tried to settle --

9 **SPECIAL MASTER:** Sort of the like the
10 purge memo.

11 **MR. FARRELL:** Well, I don't know that I
12 would say it's kind of like the purge memo, because I
13 think your Honor correctly described it. It was
14 actually a retention memo.

15 I wanted to just hit on a few points
16 here because I know it's late in the day.

17 The first is we've been trying to
18 underscore the necessity of actual evidentiary proof
19 of the allegations that have been thrown around.

20 Your Honor probably noticed in
21 plaintiffs' submission no expert declaration, no
22 expert report, nobody speaking to what do these
23 actual tests mean, what are their capabilities, what
24 are their limitations and so on.

25 **SPECIAL MASTER:** Well, but in your

Page 265

1 response, in your opposition you took them to task
2 over that, didn't you?

3 **MR. FARRELL:** And that was the point I
4 wanted to highlight is that BASF --

5 **SPECIAL MASTER:** You don't need to
6 highlight it. I read it. I know what it is.

7 **MR. FARRELL:** We have in fact put
8 forward competent expert testimony explaining what
9 the tests mean.

10 And I think that's a key point, because
11 a proper understanding of the testing record is why
12 there was a basis for all of the statements that were
13 made.

14 Now, there were a couple slides that Mr.
15 Placitella showed you this morning that I wanted to
16 just walk through briefly because I think it
17 illustrates what I'm trying to say.

18 Mr. Placitella, will you put up your
19 slide 33, please?

20 **MR. PLACITELLA:** I have to put the
21 pieces back together here.

22 **MR. FARRELL:** In the interest of time,
23 your Honor, I'll keep going.

24 **SPECIAL MASTER:** This is going to be
25 forever. He's having trouble plugging one thing into

Page 266

1 the next.

2 **MR. FARRELL:** I believe it's plaintiffs'
3 Exhibit 9 that I wanted to refer to --

4 **SPECIAL MASTER:** Okay.

5 **MR. FARRELL:** -- which is the technical
6 data sheet that Mr. Placitella showed you.

7 **SPECIAL MASTER:** You mean the technical
8 data sheet that was supposedly part of the material
9 safety data sheet?

10 **MR. FARRELL:** And actually was not, yes,
11 that's the one, your Honor.

12 **SPECIAL MASTER:** Okay. The one that
13 you came over here to look at?

14 **MR. FARRELL:** That's correct.

15 **SPECIAL MASTER:** Which one?

16 **MR. FARRELL:** C.

17 **SPECIAL MASTER:** Tab C?

18 **MR. FARRELL:** We have here -- this is
19 the slide I was -- where I noticed it. So you see
20 that Mr. Placitella has highlighted the second
21 paragraph in the document.

22 **SPECIAL MASTER:** What does it say on the
23 bottom lefthand corner of that?

24 **MR. JARED PLACITELLA:** October 1978.

25 **SPECIAL MASTER:** Okay. So I'm using the

Page 267

1 right technical data sheet. Okay. I just want to
2 make sure. That would be Exhibit 9, Tab C.

3 Can you tell me, Mr. Farrell, or anybody
4 else here, whether the material safety data sheet
5 that precedes the technical data sheet, what the date
6 of it was? Because the date is blank.

7 **MR. FARRELL:** I don't believe the two
8 documents are connected. And that's part of the
9 issue.

10 **SPECIAL MASTER:** That will be my next
11 question, because when I look at the Bates numbers,
12 they don't seem to be sequential. But I want to
13 start with dates. So can you help me on that?

14 **MR. PLACITELLA:** I think the proof will
15 show that every time they issued the data sheet they
16 didn't put a new date on it.

17 **MR. FARRELL:** There's actually multiple
18 data sheets with different dates on them. The point
19 that I wanted to make --

20 **SPECIAL MASTER:** Well, the one that I'm
21 looking at, which is immediately preceding that
22 technical data page, has no date on it whatsoever.
23 So I don't know if this material safety data sheet
24 was ever used, was ever sent to anybody.

25 **MR. FARRELL:** That's exactly correct,

Page 268

1 your Honor. And that I think is part of the point
2 that Mr. Bress was alluding to and that I also wanted
3 to highlight, which is the lack of evidence actually
4 proving up that documents were used in the way that
5 the plaintiffs claim they were used.

6 I also think that this technical data
7 sheet illustrates the problems we have here with the
8 supposed reasonable inferences that can be drawn from
9 documents.

10 You see that Mr. Placitella has
11 highlighted on his slide 33 the second paragraph of
12 the technical data sheet, which is a paragraph that
13 contains the language regarding no trace of any
14 asbestos minerals.

15 And Mr. Placitella told you that this is
16 a false statement and fraud because at the time
17 Engelhard had evidence that there was asbestos in the
18 talc.

19 What he didn't tell you is that the very
20 next paragraph in the document, the third paragraph,
21 goes on to discuss the fact that the company did have
22 false positives, that there were some tests that
23 reported asbestos shaped fibers, but when you
24 actually looked at them with more powerful equipment,
25 it was determined that it wasn't asbestos.

Page 269

1 And this wasn't a statement that was
2 made up out of whole cloth. It was actually based on
3 testing data that Mr. Placitella has and that BASF
4 has today. It is in a testing document that appears
5 in plaintiffs' Tab Number -- Exhibit 3, Tab Number 2.

6 And I have a loose copy here if it would
7 speed things along or I'd be happy to show your Honor
8 where it is in the binder.

9 **SPECIAL MASTER:** Nothing in my life gets
10 speeded along in this case. I think I have it right
11 here. What's the Bates number?

12 **MR. FARRELL:** The Bates number is BASF
13 Samson and then a bunch of zeros 13076.

14 **SPECIAL MASTER:** Okay. That's the
15 second page. Now, again help me out. Going back to
16 that technical data sheet that's up on the screen
17 when you pointed out the third paragraph of it, when
18 I read that, it tells me that randomly you might look
19 at something at relatively low magnification and it
20 may have something appearing to be asbestiform.

21 **MR. FARRELL:** Correct.

22 **SPECIAL MASTER:** And I asked the
23 question of Mr. Placitella, because as far as I
24 understand, asbestiform is not a supplement for
25 asbestos, it is a --

1 **MR. FARRELL:** It's a shape.

2 **SPECIAL MASTER:** It's a term of art
3 defining the shame of something --

4 **MR. FARRELL:** Your Honor is --

5 **SPECIAL MASTER:** -- that makes it look
6 like but is not necessarily asbestos.

7 **MR. FARRELL:** You're a hundred percent
8 correct. The pen that I'm holding --

9 **SPECIAL MASTER:** It happens
10 occasionally.

11 **MR. FARRELL:** The pen that I'm holding
12 right now is asbestiform.

13 **SPECIAL MASTER:** Because it's a straight
14 line.

15 **MR. FARRELL:** Because it a looks like a
16 fiber. And that's exactly what was going on in the
17 tests. And the tests that I just referred your Honor
18 to, Tab 2 of Plaintiffs' 3, in the third full
19 paragraph, which begins: At about 450 times
20 magnification, Engelhard scientists recount the fact
21 that using low power microscopes you occasionally see
22 asbestiform particles that look like fibers. But
23 when you use a better microscope, it turns out it's
24 just talc that's rolled up, talc on its side, so on
25 and so forth.

Page 271

1 That was all reported in the technical
2 data sheet that Mr. Placitella told you was the basis
3 for client fraud beginning in 1972.

4 They had testing data that supported the
5 conclusion and then they reported that conclusion in
6 the technical data sheet.

7 This all relates to a certain type of
8 microscope called phase contrast microscopy, which is
9 discussed in our expert reports and in those
10 documents.

11 And that brings me to the next slide of
12 Mr. Placitella's that I wanted to show you, which is
13 number 40.

14 Mr. Placitella.

15 **MR. PLACITELLA:** Hold on one second.

16 **MR. FARRELL:** While he's pulling it up,
17 I'll note, your Honor, this distinction, the issue of
18 unreliable tests and better tests that actually show
19 you reliable results, the limitations of PCM and so
20 on and so forth, essentially form the basis for all
21 of the company's marketing statements in the 1970s
22 and have a significant role in the statements that
23 were made in litigation later.

24 So the document that I'm showing to you,
25 this document from 1972, the test, to us is a key

Page 272

1 document. This is showing what the company believed.
2 We have some test that are unreliable. Better
3 testing shows different results. And throughout the
4 early part of the 1970s, the better results, as
5 recounted in our expert report, showed no asbestos.

6 I wanted to pull up this document,
7 number 40, because it illustrates the point.

8 Mr. Placitella showed you 1972 testing
9 and then 1977 testing.

10 What he didn't say is that both of these
11 tests used the phase contrast microscope that the
12 company believed was unreliable for determining the
13 presence of asbestos. And not just Engelhard, the
14 United States government thinks it's unreliable.

15 **SPECIAL MASTER:** These days that's not a
16 good thing.

17 **MR. FARRELL:** Every reputable asbestos
18 expert in the United States thinks it's unreliable
19 for differentiating asbestos from talc.

20 I think that's probably why you don't
21 see an expert declaration from the plaintiffs on this
22 issue.

23 The next slide I wanted to talk about is
24 number 45. Mr. Placitella.

25 **MR. PLACITELLA:** Hold on one second.

Page 273

1 **MR. FARRELL:** So this is slide 45, which
2 quotes again a portion of a May 22nd, 1979, testing
3 document.

4 And this was the portion of the
5 plaintiffs' presentation where they started talking
6 to you about the findings of abundant fibers. And
7 they were trying to draw the distinction between
8 abundant and trace. And the suggestion was that
9 abundant was some monumental amount of asbestos and
10 therefore any argument by BASF that there was only
11 trace amounts of asbestos in the talc is false.

12 If you turn to the second page of the
13 document that the plaintiffs put up here, which they
14 didn't put in their slide --

15 **SPECIAL MASTER:** And where do I find
16 that? Because they have it as Exhibit 4E. And we've
17 already ascertained that it's not 4, it's 3, right?

18 **MR. FARRELL:** It's Tab 29 of plaintiffs'
19 Exhibit 3.

20 **SPECIAL MASTER:** Tab 29. And You want
21 me to look at the second page?

22 **MR. FARRELL:** It's the very first
23 sentence of the second page. After discussing the
24 test results that Mr. Placitella put up on the screen
25 and tried to suggest that abundant meant some

Page 274

1 monumental amount of asbestos, this same May 22nd,
2 1979, document says, quote: It can be seen that most
3 of the samples have less than .01 percent fibers.
4 With the exception of 79J-4, an Emtal 42 product
5 processed 2/13/79, this particular sample had about
6 0.3 percent fibers.

7 So the point here being --

8 **SPECIAL MASTER:** What's the magic
9 number? At which point does this become bad for you?

10 **MR. FARRELL:** Well, I'll submit to the
11 Court it's much higher than 0.3 percent. And I think
12 we also --

13 **SPECIAL MASTER:** I know you're
14 submitting that. But what's the basis for your
15 submission?

16 **MR. FARRELL:** The basis for my
17 submission is the expert reports that we included
18 with our materials where they discuss the fact -- and
19 I believe it's paragraph 49 of the expert report from
20 Drew Van Orden that we submitted wherein he discusses
21 the fact that words like abundant, many, trace, the
22 sorts of things that you see in those documents and
23 that the plaintiffs rely on, are just arbitrary terms
24 that don't actually tell you anything about the
25 amount of asbestos that's in a product.

Page 275

1 **SPECIAL MASTER:** Like highly unlikely
2 meaning impossible.

3 **MR. FARRELL:** Exactly, your Honor.

4 Slide 47, Mr. Placitella.

5 I'm sorry, your Honor. I'm told it's
6 paragraph 48 of the Drew Van Orden report.

7 **SPECIAL MASTER:** Okay.

8 **MR. FARRELL:** The reason I wanted to
9 call your Honor's attention to this particular slide
10 is because Mr. Placitella showed it up. This is a
11 few moments after he told you that the company knew
12 as of the early 1970s that there was asbestos in the
13 talc.

14 And the language that caught my eye on
15 this document from 1979 is that the plaintiffs
16 themselves called out the sentence that characterizes
17 this as a, quote, newly recognized risk.

18 How could it be a newly recognized risk
19 if it dated back to 1972 years later?

20 The whole point was that in 1979 there
21 were new test results that reported new things, not
22 things that dated back to 1972.

23 **SPECIAL MASTER:** Well, except that if
24 the 1979 test reported a presence of asbestos, didn't
25 you have to disclose that?

Page 276

1 **MR. FARRELL:** In what context, your
2 Honor? Because I think --

3 **SPECIAL MASTER:** In the context of the
4 client saying: I don't want anything that has
5 asbestos in it. In the context of someone who sues
6 Engelhard saying: I used your product and I've
7 contracted asbestosis or mesothelioma or some form of
8 asbestos related cancer.

9 And instead, what plaintiffs say is that
10 in each one of those instances your response was:
11 Emtal talc does not contain asbestos, period.

12 **MR. FARRELL:** And there was a basis for
13 that statement. And the basis for the statement is
14 that even contemporaneous with the 1979 tests
15 reporting trace amounts of asbestos in some samples,
16 there were many other tests that still said no
17 asbestos.

18 And even testing that's been done today
19 on actual samples of Emtal talc has found no asbestos
20 in the talc.

21 That's also included as part of Mr. Van
22 Orden's and Dr. Gunther's submissions.

23 So I think by the second half of the
24 plaintiffs' presentation they were attempting to walk
25 past the issue of well, how much asbestos was there.

Page 277

1 That's the key issue. The whole basis
2 for these statements both in the marketing materials
3 and later in the litigation was a product of how much
4 asbestos was there and how often was it there and
5 what was the basis for saying those things.

6 The fact that there were trace amounts
7 of chrysotile asbestos in some samples of the talc in
8 only a portion of the operation of the mine is a key
9 fact that became the basis for statements that were
10 made later.

11 **SPECIAL MASTER:** But you also have
12 deposition testimony of Dr. Hemstock who said based
13 upon his calculations in respect of one customer
14 alone, Congoleum, you're talking about 1.8 million
15 pounds of asbestos fibers that were being delivered
16 to Congoleum each year.

17 **MR. FARRELL:** I'm glad you raised that,
18 your Honor.

19 **SPECIAL MASTER:** I know you are. That's
20 why I was giving you an introduction.

21 **MR. FARRELL:** You might have looked at
22 my card. That was the next slide on my list.

23 **SPECIAL MASTER:** I looked at Mr. Assaf's
24 card.

25 **MR. FARRELL:** Number 56, Mr. Placitella.

Page 278

1 This is exactly the issue that your
2 Honor observed, which is that the language quoted on
3 Mr. Placitella's slide again uses that magic word
4 asbestiform, not asbestos.

5 And when you actually look at Dr.
6 Hemstock's testimony from 2012, not from 1983, he
7 focused on that exact distinction. He recognized the
8 distinction between asbestiform and asbestos and was
9 talking about the fact that yes, sometimes we found
10 asbestiform materials, but they weren't always
11 asbestos.

12 So to me the math equation that the
13 plaintiffs tried to walk him through is largely a red
14 herring. It's telling us that based on some back of
15 the envelope that they tried to get Dr. Hemstock to
16 walk through, he did some math based on asbestiform
17 materials, not on asbestos.

18 The other point I would note is if it
19 really were true that there were 600,000 pounds of
20 asbestos delivered to one customer in one year, I
21 kind of think somebody would have noticed the fact in
22 1979 that there were essentially dump trucks full of
23 asbestos in this talc that was being delivered.

24 And yet what you see both from
25 government testing, from customer testing, is them

Page 279

1 all agreeing with Engelhard that there's no asbestos
2 in the talc.

3 B. F. Goodrich, one of the customers
4 that Mr. Placitella has focused on and put a few
5 documents up on the slides, tested the talc itself in
6 the second half of the 1970s and said: We found no
7 asbestos in your talc.

8 So it seems to me to be a fundamental
9 disconnect between the claim that there's 600,000
10 pounds of asbestos being delivered to one customer
11 and with the same customer saying: We're doing this
12 testing and we're not finding any asbestos. And the
13 government doing testing and saying: We're not
14 finding any asbestos.

15 The explanation is first that the math
16 is absurd. But second, we're talking about
17 asbestiform and not asbestos.

18 **SPECIAL MASTER:** It's not math. It's
19 arithmetic.

20 **MR. FARRELL:** Arithmetic.

21 **SPECIAL MASTER:** Which can still be
22 absurd, but a different issue.

23 **MR. FARRELL:** So the point I'm trying to
24 make here, your Honor, is you had raised the issue of
25 reasonable inferences from the documents. And I

Page 280

1 believe you used terms like the facts marshaled from
2 the plaintiffs.

3 The problem is that the documents you've
4 seen, the facts that have been marshaled aren't even
5 supported by the documents that have been shown to
6 you. And they're certainly not supported by
7 competent evidence from experts, others who could
8 actually tell you what the documents mean.

9 We have done that. BASF has done that
10 and explained what the documents mean and how they
11 actually inform the sorts of statements that the
12 plaintiffs are claiming are false but frankly were
13 true at the time they were made.

14 Thank you, your Honor.

15 **SPECIAL MASTER:** You want to come back,
16 Mr. Assaf?

17 **MR. ASSAF:** A little bit back on
18 procedure, your Honor. Thank you.

19 A couple points. On procedure, I know
20 we're going to do the brief on the spoliation. The
21 last 10 or so slices which Mr. Placitella
22 acknowledged were totally new in terms of him now
23 trying to say these are the in furtherance documents,
24 these are the timelines, and I appreciate your
25 anti-sandbagging sentiment, I would like the

Page 281

1 opportunity to address those either in a brief or in
2 the argument after the spoliation brief.

3 **SPECIAL MASTER:** You're assuming there
4 will be argument after the spoliation brief.

5 **MR. ASSAF:** Well, I did. Again, I'm
6 watching you. I'm learning from you. I think
7 you've already said that on important issues, you
8 know, we can come and see you. And I think these are
9 important issues. And we'd like to come back after
10 we submit and especially address those last 10
11 slides, which we'll now get copies of from Mr.
12 Placitella and do that. That's number 1.

13 **SPECIAL MASTER:** I will be guided by
14 what you all want. But I will tell you that my
15 original inclination was to get the brief and then
16 spend some time deciding it, because this is one
17 you're not going to get a decision that day. I'm
18 going to write something, because the issue merits
19 it.

20 On most of the other things I can give
21 you an explanation, do what we call in New Jersey a
22 bench opinion, which is what I normally do, and then
23 send you an order.

24 This is a little different. No matter
25 how it gets resolved, I think somebody or another is

Page 282

1 going to seek review.

2 And I owe it to Chief Judge Linares to
3 give him something that he can look at and say either
4 I'm completely off my medication or maybe I actually
5 got it right.

6 **MR. ASSAF:** And I appreciate that, your
7 Honor. For clarification, you're talking about
8 addressing stage 1, whether there's a prima facie
9 case that would then go forward?

10 **SPECIAL MASTER:** In my view, I have no
11 choice.

12 **MR. ASSAF:** Correct.

13 **SPECIAL MASTER:** It's a tiered
14 examination. If I don't find that there's a prima
15 facie case, I don't get to the second step.

16 I know that plaintiffs have argued that
17 I can look at step 2 to determine step 1. I just
18 don't agree on that. I think there is a procedure
19 and it makes sense to me.

20 **MR. ASSAF:** So I'll follow your Honor's
21 guidance. But I would like to come back, because we
22 will have a 60 page brief and we will have --

23 **SPECIAL MASTER:** No, we're going to have
24 a brief hopefully not more than 60 pages, but
25 substantially less, because Mr. Bress is going to

Page 283

1 make sure of that.

2 **MR. ASSAF:** And we will have the
3 opportunity to review the new slides, admittedly new
4 slides. And I'd like to argue those in front of your
5 Honor.

6 **SPECIAL MASTER:** Okay.

7 **MR. ASSAF:** And then in the interim,
8 your Honor, I'm going to ask you to consider, given
9 your very questions and Mr. Farrell's dispute with
10 Mr. Placitella about science, whether we can now have
11 science day, because I'll make the point to your
12 Honor no judge, no judge, no mediator, no Special
13 Master who's ever been involved in this case has had
14 a science day.

15 **SPECIAL MASTER:** Do you really think I
16 need one --

17 **MR. ASSAF:** I do, because --

18 **SPECIAL MASTER:** -- in light of what
19 you've heard today?

20 Even Mr. Farrell thinks that I know my
21 stuff, so...

22 **MR. ASSAF:** I do think you know your
23 stuff, your Honor. And I'll be honest with you, I
24 think the reason I want one is because we're going to
25 put points on the board in terms of confirming that

Page 284

1 most of these slides cannot be trusted in terms of
2 the science. And there's a reason why -- if the
3 plaintiffs felt so strongly about their case, why
4 wouldn't they want their expert, Fitzgerald, to spend
5 an hour and have you ask him some questions?

6 I think that's dangerous, because you do
7 know enough. And so I would like to have --

8 **SPECIAL MASTER:** So you're saying I know
9 enough to be dangerous?

10 **MR. ASSAF:** Yeah, I actually --

11 **SPECIAL MASTER:** I don't think that's a
12 compliment actually.

13 **MR. ROTH:** Your Honor, if I said that,
14 it would be like another weekend e-mail.

15 **SPECIAL MASTER:** That's exactly right.

16 **MR. ASSAF:** Mr. Roth suggested I say
17 that.

18 **MR. ROTH:** You took my card.

19 **MR. ASSAF:** Your Honor, that's what I'm
20 saying. Listen, if it turns out that it's five hours
21 and it's a waste of time, our bad.

22 But these are such important issues, why
23 wouldn't the plaintiffs want you to ask their expert
24 questions about this asbestiform issue?

25 **SPECIAL MASTER:** I can't tell the

Page 285

1 plaintiffs how they need to present their case.

2 They are very good lawyers. This is not their first
3 rodeo. They know what they need to do.

4 **MR. ASSAF:** Well, then I would ask
5 permission that we be able to present -- and they
6 could cross. If they don't want to bring anybody, I
7 could have an expert come here and what I would think
8 distill some of the key scientific points from the
9 slides that Mr. Placitella showed and show you why
10 it's just wrong on the science.

11 Mr. Placitella could ask him questions.
12 You could ask him questions. And what's the worst
13 that could come of that? It would be like you're a
14 litigator.

15 **SPECIAL MASTER:** It would be another day
16 in my life I wouldn't get back. So there's always
17 that.

18 Let me think about it. My inclination
19 is no, I don't think it's necessary. I don't want
20 people to do something that's unnecessary under the
21 circumstances.

22 When I look at the number of lawyers who
23 are in this room, I can hear the meters running.
24 This is an expensive proposition for all the parties
25 who are involved.

Page 286

1 And so as you well know, I tend to be
2 very cautious about that. And we've spent a great
3 deal of time on the motions today.

4 So I do want to get Mr. Bress's brief,
5 underscore the word brief. And I know he's going to
6 be parsimonious with his words.

7 You know why they call them briefs,
8 right?

9 **MR. BRESS:** I'm aware, your Honor.

10 **SPECIAL MASTER:** Okay.

11 **MR. ASSAF:** Just procedurally then, your
12 Honor --

13 **SPECIAL MASTER:** I think Mr. Placitella
14 is going to want to speak in reply, so --

15 **MR. ASSAF:** Oh, I'm sorry. Okay.

16 **MR. PLACITELLA:** A couple of things.
17 One, science day, there was a motion for science day.

18 **SPECIAL MASTER:** And it was denied
19 without prejudice. So they can bring it again.

20 **MR. PLACITELLA:** They can file the
21 motion and we'll respond again.

22 **SPECIAL MASTER:** Exactly right.

23 **MR. PLACITELLA:** The last 10 slides,
24 I'll send them to him. But you basically obviated
25 those slides because you said: I'm not going to look

Page 287

1 at that stuff that you're showing me. Give me your
2 list. That's what you get to do.

3 So why they would need a brief in
4 response to slides that you're refusing to look at --

5 **SPECIAL MASTER:** Well, they want to --

6 **MR. PLACITELLA:** -- it's fine.

7 **SPECIAL MASTER:** They want to look at
8 the slides. I know you're going to send them to
9 them.

10 **MR. PLACITELLA:** Right.

11 **SPECIAL MASTER:** And they're going to
12 make a judgment as to whether they need to address
13 them any further.

14 And I'm sure that Mr. Assaf will come to
15 the reasonable conclusion that he really does not
16 have to address them any further. But that's Mr.
17 Assaf's conclusion to reach.

18 **MR. PLACITELLA:** I have some substantive
19 comments. It will take less than 10 minutes.

20 **SPECIAL MASTER:** Okay.

21 **MR. PLACITELLA:** Maybe less than five.

22 **SPECIAL MASTER:** Shorter the better.
23 But take as much time as you need.

24 **MR. PLACITELLA:** I understand. So the
25 issue was raised why do we include the information --

Page 288

1 **SPECIAL MASTER:** I'm so sorry. My
2 apologies again. You're over there to the left.
3 Miss Gussack, anything you want to add?

4 **MR. GUSSACK:** No, your Honor. We join
5 in the argument that BASF has made. And we won't
6 burden the Court with further argument.

7 **SPECIAL MASTER:** Pay attention. That's
8 a good argument. Okay.

9 **MS. GUSSACK:** It's an extremely lucid
10 argument.

11 **SPECIAL MASTER:** Short and sweet.
12 I'm sorry, Mr. Placitella. Go ahead.

13 **MR. PLACITELLA:** I'll try to be less
14 than five minutes.

15 **SPECIAL MASTER:** You're taking more time
16 telling me how little time you're going to take.

17 **MR. PLACITELLA:** Yes. The issue was
18 why did we raise the issue about what the customers
19 were told.

20 The issue is because BASF points to
21 Cahill like it was all their idea. The point here
22 was that the intent to --

23 **SPECIAL MASTER:** I don't think that's a
24 fair appraisal of the evidence. I don't think BASF
25 is --

Page 289

1 **MR. PLACITELLA:** Well, let me rephrase
2 it.

3 **SPECIAL MASTER:** -- dumping this on
4 Cahill.

5 **MR. PLACITELLA:** Let me rephrase it.
6 They talk about intent. It goes to intent. What
7 they did even before litigation goes to intent.
8 They did not want the issue of asbestos in their talc
9 disclosed. And they did that before there was even
10 litigation. It was ongoing.

11 So the idea or the notion there was
12 no intent did not originate with Cahill. It
13 originated with Engelhard. And it just kept going.

14 Cahill might have been the agent that
15 carried out the strategy. But the notion of where it
16 came from originated -- that's why we discussed that.

17 When you talk about that technical data
18 sheet, it's interesting and way too deep on the
19 science. But they say they used the most
20 sophisticated methods possible and they cite x-ray
21 defraction. They never say that they did tests with
22 a transmission electron microscope and found
23 asbestos. So there's issues with this to begin with.

24 But without getting --

25 **SPECIAL MASTER:** When you say this,

Page 290

1 you're waving a piece of paper. I don't know what it
2 is.

3 **MR. PLACITELLA:** The technical data
4 sheet.

5 But when they say between 2006 and 2009
6 nothing's happened, that BASF did not continue.
7 Well, they did continue. They continued to file
8 summary judgment motions saying there was no asbestos
9 in the talc and no evidence of asbestos in the talc.
10 They continued to send letters. They continued to
11 make representations to courts. And they continued
12 to get dismissals.

13 **SPECIAL MASTER:** Was the cast of
14 characters who were Engelhard in 2006 part of what
15 had been going on before then?

16 **MR. PLACITELLA:** Some people stayed and
17 some people did not, as I understand. For example,
18 Mr. --

19 **SPECIAL MASTER:** You got to listen to my
20 question.

21 **MR. PLACITELLA:** Yes.

22 **SPECIAL MASTER:** When the transfer
23 occurred, the people who were there at Engelhard,
24 were they part and parcel of what you allege happened
25 before then?

Page 291

1 **MR. PLACITELLA:** Some, yes. Yes.

2 **SPECIAL MASTER:** Okay. And of those
3 who were, did some of them stay on in appropriately
4 supervisory capacities past 2006?

5 **MR. PLACITELLA:** I'll answer it this
6 way, because I'm not sure of the answer. For
7 example, Mr. Dornbusch was there before and he stayed
8 for a short time thereafter. I think part of his
9 package was that he had to stay for a while.

10 **SPECIAL MASTER:** To provide for an
11 orderly transition.

12 **MR. PLACITELLA:** So he was there before
13 and after. There were other people who were in the
14 legal department who were there long before and a
15 significant time after. And so there were some --

16 **SPECIAL MASTER:** My concern is BASF
17 acquires Engelhard in 2006. And at that point the
18 acquiring company, like every acquiring company in
19 the universe, looks at the company they have acquired
20 and the main decision that they make is if it ain't
21 broke, don't fix it.

22 So they're not going to go back and
23 search 20 years' worth of records. They're going to
24 say: Okay, what do we have that we need to confront?

25 And if they're told: Well, you know,

Page 292

1 we've got these cases, but this is the way they've
2 been handled all the way through, there's no scienter
3 there.

4 And it's something that at some point or
5 another somebody needs to acknowledge.

6 And I think the same is true as to the
7 folks at Cahill Gordon. If at a certain point the
8 people who were there when plaintiffs allege this
9 whole thing was concocted, if it becomes
10 institutionalized, at some point it's hard to say,
11 well, you know, you're doing this with scienter, when
12 in fact they're just doing it because that's the way
13 it's being done.

14 **MR. PLACITELLA:** Well, their agent, Mr.
15 Sloane, sat in the depositions in Westfall and he was
16 still actively litigating the case well past the time
17 that Cahill Gordon -- I mean, I'm sorry, that BASF
18 took over Engelhard.

19 So there was continuity there. And
20 there was clear institutional knowledge. And we can
21 prove that pretty solidly, frankly.

22 **SPECIAL MASTER:** Okay.

23 **MR. PLACITELLA:** It is unclear, and
24 we're in the process of taking depositions, what
25 everybody's role was, even if they were there before

Page 293

1 and after. They were there before and after, we know
2 that. What their exact role was is unclear until we
3 take those depositions.

4 **SPECIAL MASTER:** If they had nothing to
5 do with this litigation --

6 **MR. PLACITELLA:** Exactly.

7 **SPECIAL MASTER:** -- or similar
8 litigation.

9 **MR. PLACITELLA:** Right. So it's unclear
10 to me at this point. Keep in mind we filed this --
11 we were asked to file this motion without
12 depositions. So I can't answer every question.

13 I may know information that if I didn't
14 want to trample a violate a Supreme Court order,
15 which I'm not going to do, I could answer many of
16 your questions. But I can't do that. And it's hard
17 to tell the left side of your brain, you know, not to
18 intrude on the right. But a lot of the things I've
19 been asked point-blank I can't answer. I would love
20 to answer them, but I can't answer them.

21 **SPECIAL MASTER:** Well, this is not the
22 first time in your career you've had that problem.

23 **MR. PLACITELLA:** That's exactly right.
24 Of Mr. Farrell threw up a couple of isolated test
25 results.

Page 294

1 **SPECIAL MASTER:** Mr. Farrell does that.

2 **MR. PLACITELLA:** Right. They verified
3 asbestos in this talc using transmission electronic
4 microscopes, SEM, PLM, XRD. And by the way, PLM is
5 what OSHA sanctioned. It's not that great. But it's
6 what OSHA sanctioned. So by every scientific --

7 **SPECIAL MASTER:** I have no clue what any
8 of those acronyms stand for.

9 **MR. PLACITELLA:** But my point is by
10 every scientific analysis that was available by
11 multiple parties, that is multiple scientists, they
12 found asbestos. They just didn't take some
13 unreliable -- and it almost begs the question. All
14 right.

15 And here's where I end my presentation.
16 It almost begs the question, because the inquiry
17 isn't what information -- the inquiry here is you
18 said that -- and you told courts and litigants that
19 there was no evidence of asbestos, no evidence of
20 asbestos, no evidence exists.

21 Mr. Carter signed an affidavit saying
22 there was no testing data. That was false.

23 Those people, respectfully, had a right
24 to hire their own experts to evaluate that.

25 And you say well, how much is enough?

Page 295

1 If you look at the Robertson case, okay, the
2 Robertson case is a significant case. The Robertson
3 case was a case that went to the Third Circuit Court
4 of Appeals. It was a case that was handled by Mr.
5 Rothenberg after Engelhard got out of the case. The
6 trial judge dismissed the case because he said there
7 just wasn't enough asbestos in that talc and the
8 proofs weren't that great, the product ID wasn't that
9 great.

10 And it went to the Third Circuit. And
11 the Third Circuit said: Well, even with this little
12 bit of asbestos -- and frankly, it was a lot less
13 than these tests show -- even with this little bit of
14 asbestos, these plaintiffs have the right to go
15 forward and litigate their case.

16 What happened here was these plaintiffs
17 lost that right. They lost the right to hire their
18 own experts with the right data.

19 So it does not matter. We don't need
20 science day. This is about -- they said there was
21 no evidence. They didn't say there was no reliable
22 evidence. They said there was no evidence. They
23 said there was no testing data.

24 **SPECIAL MASTER:** Well, but if you have
25 someone who performs a test and the test that he or

Page 296

1 she performs is one that is not in accordance with
2 generally accepted professional standards, isn't it
3 the right of someone else to say that test was not
4 performed in accordance with generally accepted
5 professional standards, so I'm going to disregard it
6 because it's not evidence of anything, it wasn't
7 properly done. And I --

8 **MR. PLACITELLA:** But they didn't -- I'm
9 sorry.

10 **SPECIAL MASTER:** And I think that that's
11 what lies at the root of Mr. Assaf's request for a
12 science day. It's not to educate me about the
13 science, which I can assure everybody here would be
14 an entirely futile endeavor, but to put in the record
15 what the basis of those determinations was so that
16 people can say, hey, understand, there were these
17 reports, but if you look at it, you know, they were
18 testing for apples and they found oranges. It's not
19 a good report, so it's not evidence of anything.

20 So therefore, when we say there is no
21 evidence, and they also add and we conducted our own
22 reports and they don't come to the same conclusion,
23 that maybe there's no scienter in what was being
24 done.

25 And in order to prove a crime or fraud,

Page 297

1 you do have to prove a guilty mind.

2 **MR. PLACITELLA:** Yes, your Honor. But
3 there was a lot more than that, because they never
4 gave anybody the opportunity.

5 They said there was no testing data.
6 There was nothing for anybody to look at and
7 evaluate. They had three of their own scientists
8 testify under oath that they found asbestos in the
9 talc. Their own scientists. Right. That was
10 buried. Right. That was entirely buried. They
11 said there was no -- and when they were asked under
12 oath: Did anybody ever testify before on these
13 issues? No.

14 Well, that's not true. They gave
15 nobody the opportunity to pursue their case.

16 This is not about whether they would
17 have won their case or lost their case. This is
18 about whether the opportunity was taken from them.

19 And by them stating that there was no
20 evidence of asbestos in the talc, withholding all the
21 test results so that the plaintiffs' own experts
22 could look at them and make their own judgment to go
23 forward, and by them actually having sworn testimony
24 from their own scientists, which they buried, and
25 they knew it, that's fraud.

Page 298

1 That's enough, I submit, that we have
2 made out our prima facie case. We're only making a
3 prima facie case. We're not trying our case here.

4 **SPECIAL MASTER:** No, you're not.

5 **MR. PLACITELLA:** We're not trying our
6 case here. But here we have clear evidence. They
7 can determine -- they can argue what it means. But
8 there is clear data. There's clear evidence. You
9 have sworn testimony. And they made the judgment
10 that they were going to withhold it.

11 That's not permitted under any court
12 rule in any place. It impacts the integrity of what
13 we do as a profession, that no one would -- no one in
14 this room -- I know almost every lawyer in this room.
15 No one in this room would do that. No one.

16 And what they did was wrong. It was in
17 violation of their responsibilities.

18 These people were -- they lost their
19 rights to move forward. They lost their right to
20 make their own informed decision. They could have
21 taken all that data and given it to an expert and the
22 expert says: You know what, on balance this is not
23 worth it.

24 They didn't give them that right because
25 they knew it was important enough and it was

Page 299

1 significant enough that they got rid of it.

2 If it was so insignificant, then why
3 didn't they just turn it over? If the testimony of
4 Dr. Hemstock, Mr. Gale, and Dr. Triglia was so
5 insignificant, then why didn't they just turn it
6 over?

7 Because what happened here, when Mr.
8 Ashton signed his affidavit and said there's no
9 evidence of asbestos in that mine --

10 **MR. ASSAF:** That's not what he said.

11 **MR. PLACITELLA:** -- they knew that they
12 had their own scientists that came to a different
13 conclusion.

14 So at the end of the day -- and I'm
15 going stop here -- courts and litigants were all told
16 the same thing. People's cases were compromised. It
17 was not just in letters. It was in sworn statements.
18 It was in briefs that many judges probably spent
19 weekends reading. And as a result --

20 **SPECIAL MASTER:** I know the feeling.

21 **MR. PLACITELLA:** Yes. And as a result,
22 these people lost their rights.

23 And that, your Honor, is a prima facie
24 case of fraud under the standard that we're talking
25 about today.

Page 300

1 And all that does is say to you, okay,
2 let's go to the next step. Let's actually see
3 what's there. Maybe Placitella and Roth, they're
4 all wet. Maybe we'll look at these documents and --

5 **SPECIAL MASTER:** Well, there's no maybe
6 about that.

7 **MR. PLACITELLA:** -- and there's -- maybe
8 we'll look at those documents and there nothing.

9 But supposing the documents, despite
10 whatever Mr. Farrell said, the parties are discussing
11 the fact that, hey, there's asbestos in this talc,
12 what are we going to do about it, right.

13 Suppose there are admissions in the
14 documents that say --

15 **SPECIAL MASTER:** So one of the documents
16 is the proverbial smoking gun, right?

17 **MR. PLACITELLA:** I don't know what's in
18 the documents. Okay. I'm not allowed to say what I
19 know.

20 But all I'm saying to you is we're at a
21 point where we've made our prima facie case. There
22 are less than 75 documents probably, even counting
23 whatever's in the compilation, for you to look at.
24 You spend more time --

25 **SPECIAL MASTER:** And your son, Mr. Jared

Page 301

1 Placitella, is going to get me a list of that by
2 Wednesday.

3 **MR. JARED PLACITELLA:** Thank you, your
4 Honor.

5 **SPECIAL MASTER:** Wednesday at five p.m.
6 Eastern time.

7 **MR. PLACITELLA:** You will spend more
8 time reading the 120 pages of briefs on whether
9 documents were destroyed or not, which -- and, you
10 know, I'll never get the opportunity to respond to
11 that. And I understand why.

12 But if their proof ultimately
13 demonstrates to you that all the documents are there,
14 that only proves our case. It proves that they had
15 the information and they withheld it.

16 So it's six of -- it's one way or the
17 other. They had the information in their
18 possession, including -- we know Mr. Dornbusch had it
19 because he had the compilation. But they told
20 everybody it didn't exist.

21 So whatever they submit actually proves
22 our case. If they submit evidence that doesn't show
23 that they have all the documents, that proves that
24 stuff is missing. If they give you evidence that
25 shows you --

Page 302

1 **SPECIAL MASTER:** Proof that stuff is
2 missing is not necessarily proof of spoliation.

3 **MR. PLACITELLA:** Well, except for the
4 fact that Judge Linares has ruled that as of 1983
5 they had an obligation to retain the evidence.

6 If the conclusion is that the evidence
7 does no longer exist, then they have violated that
8 obligation. That is different.

9 So when you're talking about a prima
10 facie case of crime fraud, you're really talking
11 about two different issues. You can find crime fraud
12 under either one. You can find crime fraud solely
13 based upon the misrepresentations that were made and
14 that the people acted.

15 You can also find crime fraud if you
16 find there was a -- as part of the intent to keep the
17 information away from people, that they actually went
18 through efforts to destroy documents.

19 And even if they didn't destroy
20 documents, it's clear that they secreted them away.

21 Either way -- either way -- well, if
22 they had -- I look at your face. If they had the
23 purge memo and they collected it all, that meant they
24 had it.

25 So when they told people they didn't,

Page 303

1 that was not true. That proves our prima facie case.

2 What I'm saying to you is I could have
3 come here with two separate motions on crime fraud,
4 one on miss representation and prevailed and one on
5 spoliation. And we think we will prevail.

6 When I say spoliation, that's a bad term
7 because it's got a lot of technicals. When I say
8 spoliation, I mean destruction of evidence. Okay.
9 I could have come to you with the issue of --

10 **SPECIAL MASTER:** More appropriately,
11 failure to preserve evidence.

12 **MR. PLACITELLA:** Failure to preserve
13 evidence. And if I came to you on that basis alone
14 and I was able to show that they had an intent to get
15 rid of the evidence and the evidence doesn't exist,
16 that would be enough to satisfy my prima facie case.

17 Or I could have never came to you with
18 the spoliation -- with the destruction of evidence
19 and just come to you with the misrepresentations
20 based upon what they say they have and based upon
21 what's in that compilation.

22 **SPECIAL MASTER:** That is why I gave you
23 the option --

24 **MR. PLACITELLA:** Right.

25 **SPECIAL MASTER:** -- of either

Page 304

1 withdrawing your spoliation claim or getting a
2 sur-reply brief.

3 **MR. PLACITELLA:** I understand that. But
4 I think both are --

5 **SPECIAL MASTER:** You want them both in
6 play?

7 **MR. PLACITELLA:** Right.

8 **SPECIAL MASTER:** You want them both in
9 play. And I understand that. And because of the
10 importance of this application, I'm doing something
11 that runs against the grain for me, which is to
12 condone the filing of something that I think should
13 never have been filed, not based upon what I was told
14 was the burden of proof of the filing.

15 And that's troublesome to me. I will
16 get past it. But I have to tell you it is
17 troublesome to me. And I want everybody to hear
18 that, because please don't do that.

19 You ask me: Can I get additional pages?
20 You want 35, fine. You want to do appendices, okay.

21 But there's a reason and a purpose for
22 appendices. And it's not to throw a 44 page brief
23 over the transom and call it an appendix. That's not
24 the way to do it.

25 **MR. PLACITELLA:** I take responsibility

1 for that.

2 **SPECIAL MASTER:** I was blaming you
3 anyway, so it's okay.

4 **MR. PLACITELLA:** I take responsibility
5 for that. I understand what you're saying. We'll
6 have a further conversation about some of these
7 issues.

8 All I'm saying is I'm not going to get
9 an opportunity. And I understand why. But whatever
10 they submit I believe proves our point, because if
11 they prove that they had the evidence, then it should
12 have been disclosed.

13 So I believe as we sit here today, we
14 have made out our prima facie case and that we should
15 move to the next step. And we'll look forward to the
16 Court's ruling.

17 Thank you for your time.

18 **SPECIAL MASTER:** Thank you.

19 **MR. ROTH:** Your Honor, are you going
20 to --

21 **SPECIAL MASTER:** Can you bear with me
22 for one second? I'm trying to find something --

23 **MR. ROTH:** Of course.

24 **SPECIAL MASTER:** -- that I know I
25 misplaced. There's far too much paper here.

Page 306

1 I'm sorry, Mr. Roth. Thank you.

2 MR. ROTH: Thank you, your Honor. Two
3 things. First of all, that weekend brief for you,
4 that wasn't my fault, was it?

5 SPECIAL MASTER: I'm sorry?

6 MR. ROTH: The weekend brief reading,
7 that wasn't my fault, was it?

8 SPECIAL MASTER: Well, I'm happy to
9 blame you.

10 MR. ROTH: Okay. That's what I thought.
11 I just wanted to touch quickly on --
12 circle back to the standards. We've had a lot of
13 discussion about in furtherance of.

14 And what I wanted to do is commend your
15 Honor to the briefing that we've done to show why the
16 standard in New Jersey is different from the federal
17 court cases that you've heard about today and have
18 read in the briefs.

19 SPECIAL MASTER: I get that.

20 MR. ROTH: Yes. And a part of that
21 argument, your Honor, is we think we've established a
22 prima facie case in accordance with New Jersey law
23 from those public documents.

24 SPECIAL MASTER: I get that also.

25 MR. ROTH: And that the notion that we

Page 307

1 would have to be able to show you what privileged
2 documents prove that to meet our prima facie case is
3 sort of the Major-Major issue that you identified.

4 And so although there is some discussion
5 about, you know, are we agreeing it's in furtherance
6 of, well, everything's a question of how you
7 define -- I was actually looking at the dictionary to
8 see whether or not in furtherance is the same. I
9 think it's a, you know, difference without -- we
10 don't have to spend much time on.

11 **SPECIAL MASTER:** It's a distinction
12 without difference.

13 **MR. ROTH:** Well, there is a little bit
14 of a difference the way that New Jersey law applies
15 it. And that's why I was trying not to go down that
16 road.

17 **SPECIAL MASTER:** As I said, it's not my
18 native language. So I'm going to do my best to
19 figure it out.

20 **MR. ROTH:** Today it feels like it's not
21 mine either, Judge.

22 I would point out that we don't need
23 those privileged documents to prove the prima facie
24 case, nor could we. It would really be --

25 **SPECIAL MASTER:** Well, that's not what

Page 308

1 your partner argued. Your partner argued that I can
2 use the privileged documents to --

3 **MR. ROTH:** Yes -- I'm sorry. Go ahead,
4 your Honor.

5 **SPECIAL MASTER:** He argued that I could
6 use the privileged documents to determine whether in
7 fact a prima facie case has been met.

8 **MR. ROTH:** True. But it is not a
9 requirement that you use the privileged documents to
10 determine that a prima facie case has been met.

11 **SPECIAL MASTER:** I actually think the
12 opposite, that I am not allowed to look at the
13 privileged documents in order to determine whether a
14 prima facie case exists. That's putting the cart
15 before the horse in my view.

16 **MR. ROTH:** I think we're in agreement on
17 that, your Honor.

18 **SPECIAL MASTER:** That's because you're a
19 very wise man. Okay.

20 I'm sorry, Mr. Pratter?

21 **MR. PRATTER:** I just -- at the risk of
22 opening my mouth when I shouldn't --

23 **SPECIAL MASTER:** That's every lawyer's
24 risk, so --

25 **MR. PRATTER:** I'm going to risk it.

Page 309

1 **SPECIAL MASTER:** I figured there was no
2 stopping you.

3 **MR. PRATTER:** I'm going to risk it. I
4 think what we're trying to say is in order to get to
5 step 2, you have to have the documents in front of
6 you. We don't have the documents to give you.

7 So when you said it's a Major-Major,
8 it's Catch-22, their argument is we have to present
9 the privileged documents and identify them with
10 precision in order for you to go on to the next step.

11 That's absolutely an impossible
12 standard. It can't be done. Its a circular
13 argument.

14 So I think your Honor is right that we
15 make a prima facie case based upon the applicable
16 standard with public documents in order to allow your
17 Honor -- forget about whether it's -- whether we've
18 proven crime fraud or not. The question is to allow
19 your Honor to go to the next step of looking at the
20 documents.

21 And whether you say it's in order to
22 determine whether a prima facie case was made or
23 whether crime fraud has occurred almost doesn't
24 matter. The question is the process. And I
25 think -- well, I'm not citing any cases because I'm

1 not sure what --

2 **SPECIAL MASTER:** I get it.

3 **MR. PRATTER:** I'm saying this is so much
4 to me a forest and the trees argument and --

5 **SPECIAL MASTER:** It's not easy.

6 **MR. PRATTER:** And you can't say I've got
7 to have all the trees in front of me in order to
8 determine there's a forest out there and what kind of
9 trees they are. Is it a beech tree, an elm tree, an
10 oak tree, a maple tree?

11 **SPECIAL MASTER:** As I tell my
12 children --

13 **MR. PRATTER:** We're saying there's a
14 forest.

15 **SPECIAL MASTER:** As I tell my children,
16 if it were easy, any idiot could do it. Because it's
17 hard, it requires a special kind of idiot.

18 **MR. PRATTER:** Well, I'm a special kind
19 of idiot.

20 **SPECIAL MASTER:** Well, welcome to my
21 club.

22 **MR. PRATTER:** But my point is, you know,
23 I just sit here and almost marvel at some of these
24 arguments, which just seem to me angels dancing on
25 the head of a pin.

Page 311

1 **SPECIAL MASTER:** Well, there's a little
2 bit of that.

3 Now, if I don't let Mr. Assaf talk
4 again, he's going to go home and kick his dog, so --

5 **MR. ASSAF:** Two dogs.

6 **SPECIAL MASTER:** Two dogs.

7 **MR. ASSAF:** I wasn't going to, but the
8 10 minutes turned into 35, so I would like to make
9 three points, your Honor.

10 First to Mr. Pratter's point, I
11 fundamentally disagree and --

12 **SPECIAL MASTER:** I'm shocked that you
13 would disagree.

14 **MR. ASSAF:** I'll tell you why, your
15 Honor, because of case law. Case after case, when
16 you review what courts have done on crime fraud
17 rulings, especially within the Third Circuit, is that
18 they've actually had evidentiary support.

19 And your colloquy with Mr. Placitella
20 regarding, well, is there a cross-over, who was there
21 when, and then he talked about Mr. Carter.

22 What normal litigants do in these cases,
23 and I've handled them before, is that they come to
24 court having taken Mr. Carter's deposition, having
25 taken depositions saying: Your Honor, let me now

Page 312

1 show you who is where, what they're doing, without
2 even knowing the privileged information. That's
3 what litigants do.

4 And if you review those cases within the
5 Third Circuit, that's why we've having so much
6 trouble here, because they're not offering you
7 evidentiary support such as who was there and what
8 does Mr. Carter say.

9 Mr. Carter's being deposed in two weeks.
10 And we're talking about Mr. Carter. And Mr.
11 Placitella hasn't even deposed him.

12 Point number 2, Ashton. I have to
13 correct this. I know it's in the briefs, your Honor,
14 but he continues to say Ashton said there's no
15 evidence of asbestos.

16 **SPECIAL MASTER:** I read Mr. Ashton's
17 affidavit.

18 **MR. ASSAF:** He said based on the studies
19 above --

20 **SPECIAL MASTER:** I read Mr. Ashton's
21 affidavit.

22 **MR. ASSAF:** But as lawyers we just -- we
23 have to have some ground rules that if you're going
24 to quote an affidavit, it has to be -- for the
25 declarant's purposes it has to be correct.

Page 313

1 **SPECIAL MASTER:** But as advocates we got
2 to give a little bit of rhetorical leeway to the
3 lawyer who is arguing.

4 I don't think that anybody in this room
5 is intentionally misstating something. Just we all
6 have different perspectives.

7 And it's my job to sort of blow away the
8 smoke and try to get to the core question. And I
9 think I've -- I hope that I've demonstrated to
10 everyone in this room that I do have the ability to
11 do that and I do, do that.

12 So I don't know why you're so terribly
13 exercised about point number 2. But that's all
14 right. You have one more.

15 **MR. ASSAF:** My final point is there
16 is -- as seen here in this last 15 minutes, there is
17 an analytical divide between how we say crime fraud
18 should be approached versus Mr. Placitella's what I
19 think was a jury argument on fraud that could be
20 given virtually in any case that would then open up
21 any litigant to a crime fraud proceeding. And I
22 think that's a huge difference.

23 And again, when we now get --

24 **SPECIAL MASTER:** Have I given you any
25 reason to believe that I'm going to be persuaded by

Page 314

1 the functional equivalent of a jury argument?

2 **MR. ASSAF:** I'm going to go home and hug
3 my dogs on that note.

4 **SPECIAL MASTER:** I think you should do
5 better and hug them.

6 Okay. Anything else on the crime fraud
7 motion?

8 **MR. ASSAF:** That's it.

9 **SPECIAL MASTER:** Okay. Well, as we
10 stand now, there will be a sur-reply -- I'm sorry,
11 there will be a new list -- don't go crazy on me -- a
12 new list of Appendix C to be submitted to me by five
13 p.m. on Wednesday, what is that, the 28th of
14 February.

15 Consistent with how you did it before,
16 please send it to me. Do not file it with a copy to
17 Mr. Assaf and a copy to Miss Gussack?

18 Did I pronounce that correctly?

19 **MR. GUSSACK:** Yes, sir. Thank you.

20 **SPECIAL MASTER:** Thank you. Okay.

21 And then a sur-reply on the issue of spoliation not
22 to exceed 60 pages each from BASF and Cahill due by
23 five p.m. on March 21st.

24 Okay. At that time I want you to tell
25 me whether you want additional argument in respect of

Page 315

1 that.

2 If you do, I'm just telling you it is
3 going to be scheduled on fairly short notice, because
4 I do want to get this decided as promptly as
5 possible, largely because I've been told that it
6 might be an impediment to discovery that is ongoing.
7 And that needs to get done. That has a May deadline
8 on it.

9 So I know with all the lawyers who are
10 here, you're all going to be able to get all the
11 discovery that you need done by the discovery
12 deadline. So I'm quite confident in that.

13 But other than that, there's not much
14 more I can tell you about the crime fraud motion at
15 this stage.

16 Which then takes me to --

17 **MR. ASSAF:** On crime fraud, your Honor,
18 I also think we're going to get the slides on Monday.

19 **SPECIAL MASTER:** Oh, yes.

20 **MR. PLACITELLA:** Is Tuesday all right?

21 **SPECIAL MASTER:** Tuesday is fine.

22 **MR. PLACITELLA:** Okay. Thank you.

23 **MR. ASSAF:** And then we'll also let the
24 Court know whether we want to either respond to the
25 slides in writing or whether it's going to be

Page 316

1 encompassed in a request for oral argument.

2 **SPECIAL MASTER:** You're not going to
3 respond to them in writing.

4 **MR. ASSAF:** It will be argument. Okay.
5 Fair enough.

6 **SPECIAL MASTER:** If you think it is
7 really necessary, then we can talk about argument.

8 **MR. ASSAF:** Okay. I'll defer to Miss
9 Gussack on that.

10 **SPECIAL MASTER:** That's wise.

11 Okay. And now to Mr. Assaf's
12 housekeeping letter of February 22nd.

13 Does everyone know what I'm talking
14 about?

15 **MR. ROTH:** Mr. Assaf and Mr. Pratter and
16 I had a conversation about checklist items. We've
17 discussed this list before the letter was sent to
18 your Honor.

19 We're not here with a substantive
20 argument, but putting the cat on the roof, so to
21 speak, about issues that we're going to anticipate
22 down the road.

23 **SPECIAL MASTER:** Well, what do you need
24 me to today?

25 **MR. ASSAF:** I think the only thing, your

Page 317

1 Honor, we'll need you to do is we will be -- not an
2 order. I know Mr. Roth is working. We really need
3 dates and just some judicial encouragement on dates
4 for depositions I think.

5 **SPECIAL MASTER:** You are hereby
6 judicially encouraged.

7 **MR. ROTH:** Got it, Judge. I was
8 encouraged by Mr. Assaf before that. But I
9 appreciate all the encouragement I can get.

10 **SPECIAL MASTER:** But it's so much better
11 when it comes from me, right? There you go.

12 **MR. ASSAF:** And so yeah, I think you
13 have some Bevan -- I hate to put more work on you. I
14 think you have some Bevan e-mails and documents that
15 we're --

16 **SPECIAL MASTER:** I haven't received them
17 yet.

18 **MR. ROTH:** You have not, your Honor.
19 You're going to have them -- on Monday I'm told -- on
20 Monday you're going to have them, your Honor.

21 **SPECIAL MASTER:** How much is that?

22 **MR. JARED PLACITELLA:** I'd have to
23 check, your Honor. I'm not sure offhand.

24 **SPECIAL MASTER:** A guess? Is it as much
25 as the last batch you sent to me?

Page 318

1 **MR. JARED PLACITELLA:** No, there's not
2 nearly as much.

3 **SPECIAL MASTER:** Because I asked Mr. --
4 you sent it and I asked Mr. Reiley: Well, can you
5 please print that out?

6 And I don't know if you're aware, but it
7 was a stack that was the size of what's in this
8 binder. And as you've seen since then, I went
9 through each and every page.

10 **MR. JARED PLACITELLA:** Yes, your Honor.
11 Definitely not that much.

12 **SPECIAL MASTER:** I'll hold you to that.

13 **MR. JARED PLACITELLA:** Yes, your Honor.

14 **SPECIAL MASTER:** Okay. Anything else we
15 need to discuss today?

16 **MR. ASSAF:** I think that's it, your
17 Honor.

18 **SPECIAL MASTER:** Okay. Miss Gussack?

19 **MS. GUSSACK:** Nothing, your Honor.

20 **SPECIAL MASTER:** Well, thank you all
21 very much. I appreciate all of the arguments.
22 Always lively.


23 (The conference adjourned at 5:45 p.m.)
24
25

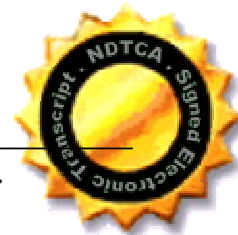
Page 319

CERTIFICATE OF OFFICER

I, ROBERT J. BOCCOLINI, a Certified Court Reporter, do hereby certify that the foregoing is a true and accurate transcript of the stenographic notes taken by me at the time, place and on the date hereinbefore set forth.

I do further certify that I am neither a relative nor employee nor attorney nor counsel of any of the parties to this action, and that I am neither a relative nor employee of such attorney or counsel and that I am not financially interested in this action.


ROBERT J. BOCCOLINI, C.C.R.
Certificate No. XI01040
Date: February 26, 2018



A				
a.m 1:13	acquired 114:10,12 114:13 158:6	addressed 79:7 147:15,17 225:22	166:22 184:14,16 184:19,22 185:8	215:6,8 216:11
abide 20:7 74:11	207:20 251:14	addresses 13:12 75:7	186:3 191:18	217:20 218:7,9,11
ability 313:10	252:25 253:21	addressing 282:8	294:21 299:8	218:14,16 223:6
able 25:12 29:25 38:10 61:10 69:10 70:17 112:8 168:18 172:16 175:21,21 195:12 203:25 222:18 225:25 230:17 249:18 285:5 303:14 307:1 315:10	254:6,10,10 255:7 291:19	adds 7:16	312:17,21,24	ain't 64:17 291:20
abolishing 44:14	acquires 291:17	adduce 59:18	affidavits 126:25	air 120:17 259:11
absence 42:9 43:1 244:17 262:18	acquiring 291:18,18	adequate 110:10	affirmative 51:24 51:25 52:1,14 217:10	al 1:3,6
absent 67:10 68:13	acquisition 206:16 255:2	adjourn 23:18	affirmatively 59:24	aligned 41:8,14
absolute 58:20	acrimonious 39:19	adjourned 25:3 318:23	agency 67:14	allegation 10:8 217:15 226:21 245:9,20 247:5 248:24 249:21 253:7,11,20 256:1 256:8
absolutely 12:14 93:16 96:13 107:11 141:14 194:7 235:12 254:21 309:11	acrimony 39:20 164:25	administering 111:6	agenda 263:8	allegations 103:6 226:17 245:14,15 249:25 250:17 251:8 254:4 264:19
absurd 279:16,22	acronyms 294:8	admissibility 113:4 168:11	agent 54:12,13,15 241:23 289:14 292:14	allege 226:22 290:24 292:8
abundant 122:19,22 122:24 126:2 133:3 135:23 136:24 273:6,8,9 273:25 274:21	act 43:23 47:7,8 51:2 67:15 68:5 70:1,2 208:5,6	admission 89:9 176:14	agents 54:10 241:24	alleged 43:25 84:19 92:21 122:2 215:21 220:13 248:4 250:4,6 262:19
accept 66:5 183:3 225:8 234:6	acted 302:14	admissions 62:19 139:13 152:12 300:13	ago 64:7 101:7,11 169:6 210:5	alleges 101:16
acceptance 18:4	acting 25:21 102:25 193:4	admit 89:7 152:25	agree 26:8 27:25 31:7,8 32:6 34:13 52:16 55:5 56:13 56:16,17 62:9 69:7 70:16 100:8 100:8 101:22 141:14 231:22,24 233:2 249:8 259:13 282:18	alleging 53:21 251:9
accepted 214:8 296:2,4	action 1:2 27:18 54:14 67:16 112:23 113:2,3,24 319:11,14	admitted 139:12 155:13 178:24 179:1 181:8	agreeable 6:15	allied 213:10
access 240:16 242:11 252:5	actions 237:8 250:5 250:11	admittedly 283:3	agreed 23:17 24:2 32:21 33:1,3 43:9 43:24 75:22 138:22 218:4	allocation 42:14 46:1,10,12 50:7 50:14 51:13,14 52:11,18 59:16,17 60:9,11,13,21,24 63:20,21,22 66:6 66:18 67:1,3 69:8 69:10 70:6,18 74:2 76:24
accessed 141:11	active 214:18 215:12	adopt 90:8 102:5	agreed 23:17 24:2 32:21 33:1,3 43:9 43:24 75:22 138:22 218:4	allocations 53:3,4 59:18 60:1 70:9
account 8:14 55:4	activities 158:22 161:17 162:7,16	adopted 220:1	agreeing 32:3 279:1 307:5	allotted 9:23
accounting 154:25 155:8	acts 52:3 94:14	adopting 141:22	agreement 29:8 35:8 42:16 49:17 58:24 61:19 62:13 63:1,22 64:3,15 64:19 65:7 139:24 257:17 258:6 308:16	allow 32:20 60:13 60:22 97:12 110:15 207:1 229:3 259:19 309:16,18
accumulated 137:14	actual 158:11 186:12 222:19 223:3 224:8 225:22 264:18,23 276:19	advance 98:2 153:16 192:10 214:18	agreements 42:5,23 43:4,6 44:11,20 44:25 46:10 47:9 54:25 57:6 58:21 63:4,6,20 65:15 78:18,18	allowed 30:9 32:2 36:3 60:24 66:18 69:18 83:17 85:16 96:24 97:2 161:3 185:14 188:17 227:9 228:19 300:18 308:12
accurate 124:13,17 124:18,20 130:8 130:18 135:4 151:18 248:1,2 319:6	add 6:23 18:12 23:7 288:3 296:21	advantage 258:24	agrees 250:21	allowing 62:25
accurately 160:11	added 91:7	advice 27:11,15 28:15 35:24 215:19,20,23 262:20,20	Aha 217:2	allows 5:15 47:8 68:11
acknowledge 252:25 292:5	adding 14:13,16 88:14	advise 43:4	ahead 15:24 56:22 288:12 308:3	
acknowledged 280:22	addition 166:22	advised 21:15 32:19 87:6	aid 82:23 93:11,14 93:24,25 94:10,16 95:10,14 213:18 213:21 214:17,17	
acknowledging 76:21 219:22	additional 239:6 304:19 314:25	advocacy 204:1		
acquire 114:16	additions 14:6	advocates 208:17 313:1		
	address 6:11 12:19 15:20 72:12 74:12 81:19 102:1 106:22,23 161:4 174:11 211:11 223:24 232:6 281:1,10 287:12 287:16	affect 42:17 63:20 63:24 237:3		
		affidavit 7:5 11:16 96:2 142:22,23 143:3,9,11,13,22 144:20,21 145:13 145:18,25 146:6 146:13,15,16,17 150:20 151:5,17 151:21 152:7		

alluding 268:2	anymore 39:7	application 12:9	Arch 2:15	art 270:2
allying 213:3	154:21 173:6	17:1 21:5 40:13	archive 170:24	artful 30:8
Alpo 106:2	184:1 192:8	42:2,9 46:11 51:7	area 121:20	Arthur 3:11 5:21
altogether 42:24	anyway 305:3	69:6 71:15 73:15	arena 232:17	68:16 196:19,21
259:15	apart 204:15 243:17	73:21 74:8,10	arguably 217:10	196:23
amassed 138:5	apologies 6:1 72:9	75:25 80:8 85:10	argue 43:20 44:10	articles 143:9,14,18
ambiguity 29:7	288:2	112:19 153:25	45:24 46:1 84:22	articulate 109:17
amount 14:12 17:6	apologize 22:2 23:5	197:11 252:22	88:23 89:21	192:21 193:9
30:13 53:3 133:5	39:13 140:11	304:10	206:22 219:9,24	articulated 108:25
273:9 274:1,25	185:20 190:16	applied 51:6 75:23	220:6 230:14	110:21 212:23
amounts 121:4,22	228:1	92:21 105:24	283:4 298:7	219:14 220:3
121:23 122:18	apologized 25:11	150:17 212:20	argued 21:6 58:22	248:23
123:6 273:11	apologizing 22:25	220:4 223:13	75:5,6 84:2	artifice 258:20
276:15 277:6	25:10	242:19	197:15 214:3	260:18
analysis 196:1	apology 22:1 75:17	applies 36:15 45:16	217:17,17,20,23	asbestiform 134:19
218:22 294:10	apparently 91:18	46:6 55:9 73:9	217:25 282:16	135:2 269:20,24
analytical 313:17	158:12 196:23	74:20,22 76:23	308:1,1,5	270:12,22 278:4,8
anathema 85:5	205:1	83:16 85:6 89:14	arguing 17:13 52:12	278:10,16 279:17
anew 142:16	appeal 62:8 91:12	89:19 93:6 100:9	61:15 83:15 86:15	284:24
angels 74:6 310:24	91:15 222:4	108:7 307:14	95:13 98:17 99:3	asbestos 7:3,6 11:5
Anguas 2:12 5:1,1	Appeals 93:4 295:4	apply 46:3 52:15	99:18,19 124:10	11:11,13 53:22
205:14,15,20	appear 8:15 186:9	65:24 72:16 73:7	196:9 214:7 221:7	89:9 90:18 110:23
Annotated 82:17	202:4	84:7,8,13 107:25	221:7 227:19	115:12 116:11,16
annoyed 229:11	appearances 2:1 4:5	108:17 113:5	313:3	116:17,19 117:3
answer 8:10 20:6	appeared 154:13	175:1 220:20	argument 12:3	120:11,15,18,19
28:22,24,25 29:13	160:8 163:18	223:2 224:6 251:3	16:11 55:9 56:12	120:22 121:23
30:9 31:22 32:2	179:23	applying 73:11	74:3,10 91:3	123:19,23 124:5,7
32:21 34:1 35:2	appearing 269:20	apportionment	97:25 98:1,5,18	126:1,7,13,14,19
51:19 65:6 70:24	appears 28:5 82:18	43:10 44:8 47:6	103:11,17 106:23	127:1,11 128:11
71:7,18 108:22	83:21 118:5	appraisal 288:24	119:24 122:20	128:21 129:4,4,14
109:12 161:7	152:10 161:25	appreciate 13:20	163:15 187:15	130:13 133:10,11
172:2 185:3 186:6	214:7 269:4	18:8 39:23 40:10	192:7 206:14	134:18 135:1,24
187:6 212:3 228:4	Appellate 91:12,16	41:8 71:9 211:18	211:12 213:17	136:25 138:16
234:6 291:5,6	91:21 104:1,9	211:19,20,23	221:9,10,12,22,23	140:20 142:23
293:12,15,19,20	105:1,15 216:14	212:17 230:15	221:25 225:5,11	143:1,15,23
293:20	217:5 220:3	235:8 236:23	227:21 232:3	145:14 148:4,17
answered 20:20	appendices 88:13	280:24 282:6	233:14,21 242:6	151:4,25 152:4
166:21,24	88:14,19 237:22	317:9 318:21	247:14 249:8,15	156:21 158:18
answering 192:2	237:23,25 304:20	approach 92:16	251:18 252:6,10	160:5,7 178:1
answers 48:23,24	304:22	230:12	252:13 254:22,23	186:7,7 198:20
94:24 96:16,17,20	appendix 16:13,14	approached 313:18	273:10 281:2,4	199:4,11,12,14
147:25 150:20	29:7 86:24 88:1,2	approaching 58:9	288:5,6,8,10	243:8,10 244:9,12
156:17 195:7	88:5,6 90:25	appropriate 12:12	306:21 309:8,13	256:19 257:11
anti-sandbagging	157:12,14 167:8,9	77:12 196:1	310:4 313:19	258:4,13 268:14
280:25	200:13,18 201:10	262:10	314:1,25 316:1,4	268:17,23,25
anticipate 316:21	202:12 227:1	appropriately 256:4	316:7,20	269:25 270:6
anybody 4:3 36:19	229:10 233:4,23	291:3 303:10	arguments 52:11,18	272:5,13,17,19
38:12 55:1 78:24	233:24 239:19	approximately 88:1	87:9,15 107:7	273:9,11 274:1,25
91:24 102:11	240:9,24 304:23	approximation	227:11 229:3,4	275:12,24 276:5,8
104:22 117:2	314:12	204:1	260:17 310:24	276:11,15,17,19
158:25 162:20	apples 296:18	April 6:23 135:25	318:21	276:25 277:4,7,15
208:24 229:16	applicability 82:11	235:16,19	arising 27:18 42:18	278:4,8,11,17,20
267:3,24 285:6	87:20	arbitrary 274:23	arithmetic 134:5	278:23 279:1,7,10
297:4,6,12 313:4	applicable 92:24	arbitration 42:4	279:19,20	279:12,14,17
anybody's 187:9	210:9,10 309:15	arc 246:24	Arkansas 147:4	289:8,23 290:8,9

294:3,12,19,20 295:7,12,14 297:8 297:20 299:9 300:11 312:15 asbestos-free 199:1 asbestosis 276:7 ascertain 19:9 ascertained 273:17 Ashton 7:5 11:10,19 143:11,12 146:2 146:16 150:20 151:5,17,21 184:14,16,19,21 185:8 191:18 299:8 312:12,14 Ashton's 11:15 145:13 312:16,20 aside 60:1 224:18 asked 29:8,10 78:14 98:9 123:18 129:1 129:12 130:10 132:6,10,14,22 133:1 145:16,17 151:15,17,20 152:6,7 154:7 156:20 171:19 172:10 173:13,21 181:23 182:21 183:10,16 187:11 201:20 207:14 209:15 234:5,22 234:22 239:21 269:22 293:11,19 297:11 318:3,4 asking 21:4 28:15 31:10 34:22 47:21 63:25 78:13 128:16 129:1 155:17 178:7,14 178:22 182:1 183:2 185:14 201:1 242:15 245:5,11 263:9 asks 17:16 65:19 71:15 aspect 70:1 Assaf 2:11 4:21,21 5:15 13:12 19:20 25:1,8 30:14 32:6 32:18 36:23 37:1 37:2 38:17 39:23 40:11,20,23 41:7 41:19 64:25 81:8 99:20,23,24 125:19 127:24	131:18 149:12,15 149:20,24 150:2,5 169:20,23 170:2,4 181:18 186:18 187:5 204:9,11,24 205:5,21 206:1,9 206:21 207:4,7,11 209:9 210:12 211:8 212:23 263:12 280:16,17 281:5 282:6,12,20 283:2,7,17,22 284:10,16,19 285:4 286:11,15 287:14 299:10 311:3,5,7,14 312:18,22 313:15 314:2,8,17 315:17 315:23 316:4,8,15 316:25 317:8,12 318:16 Assaf's 5:16 6:3,12 36:21 65:9 277:23 287:17 296:11 316:11 assert 43:17 44:5 52:21 83:13 85:4 85:9 90:14 181:2 239:22 asserted 42:20 179:12,20 asserting 31:1 33:14 45:8 180:16 assertion 29:18 49:5 79:15,21 179:13 180:18 181:4 233:10 258:24 assertions 20:2 40:13 88:4 258:23 assess 58:2 assessment 10:16 assist 210:23 239:22 assisted 131:3,6,14 associate 96:16 166:23 assume 6:2 23:6 54:9 60:7 180:15 187:12 194:15 197:7,7 200:22 206:19 225:11 235:2 248:2 255:13 assumed 76:15 assuming 100:12 106:5 172:2,6	281:3 assumption 200:24 assure 77:17 296:13 assured 33:6 attach 143:22 attached 19:23 92:19 117:1,9,12 119:10,16 144:10 attaching 29:6 144:2 attachment 119:8 attachments 167:14 167:14 attempt 240:23 241:2 attempted 7:8 attempting 276:24 attention 13:21 17:6 19:2 76:8 211:23 236:9 238:22 275:9 288:7 attested 7:5 attorney 55:10 84:18 96:6 179:12 319:10,12 attorney/client 28:10,17,22 29:14 29:17 30:22 31:5 32:10 33:14 35:16 44:12,17 45:15,20 46:13 47:11 79:22 82:16,20 84:2,17 89:4 112:19 174:25 179:12 197:12,24 201:3 202:16 208:13 220:12 250:8 259:1 Attorneys 2:7,13,18 3:4,8,11 August 9:14 172:10 authored 130:15,19 142:12 157:20 authority 57:17 123:16 available 110:2,18 113:14 114:3 116:20 233:1,17 294:10 avoid 33:21 222:22 aware 69:15 151:23 218:9,15 245:17 286:9 318:6 awful 78:14	B B 116:8 118:3 279:3 back 11:1 21:24 33:15 40:7 41:25 48:14 51:11 53:13 55:22 69:5 80:8 80:11,13 94:16 103:20 115:14 118:25 127:4 128:9 130:22 132:14 134:9 137:14,20 138:1,2 151:6 157:22 162:1 164:13 168:20,21 169:22 171:21,23,24 172:5,15 184:10 190:1 193:23 196:22 198:8 206:2,2 210:3 213:12 219:2 220:18 227:7 237:1 239:5 258:3 262:21 265:21 269:15 275:19,22 278:14 280:15,17 281:9 282:21 285:16 291:22 306:12 backdrop 42:11 background 82:14 backup 168:25 bad 4:4 39:6 121:15 242:2 274:9 284:21 303:6 bag 66:16 Baim 190:14 balance 201:22 298:22 ball 241:25 Ballard 1:11,14 banking 245:25 bankruptcy 37:20 barrier 122:7 Barry 2:16 5:8 base 249:23 based 9:8,19 29:2 38:22 42:22 50:13 58:23 68:2 86:13 107:14 110:17 117:23 121:20 151:21 152:22 153:1 154:3 155:14 187:13 189:19 215:11	218:12 224:1 225:19 226:9,23 230:18 232:3 244:9 260:12,13 269:2 277:12 278:14,16 302:13 303:20,20 304:13 309:15 312:18 bases 82:15 83:13 BASF 1:6 2:13,24 3:4 4:22,23,24,25 5:1,2,3,4,23 7:6,8 7:10,13 9:14 10:10 12:20 13:14 14:19 15:9,10 16:3,25 19:17 23:25 26:15 38:1 38:7 42:3,7 44:5 44:12 45:2,7 46:9 47:11 51:19 52:4 52:5,8,9,13,25 54:12 55:19 57:8 59:21 64:6,12 65:2,20 75:22 79:16,17,17,19 83:14 85:21 87:15 90:15,19,20,24,25 91:2,4 96:15 97:19 98:2 102:7 103:6 106:11,20 111:15 112:2 114:8,9,11,24 121:3 128:22 129:1 147:23 148:11,12 149:3 149:18,23 152:13 153:21,24 154:7 154:10,18 155:5 157:25 158:1,2,6 158:15 159:22 165:4 176:14 188:3,16 198:18 200:19 203:18 206:15,23 207:5 207:15,22 208:4 210:16 211:15 229:20 238:3 242:21 244:10 245:10 248:8 251:14 252:25 253:7,11,20 254:5 254:9,23 255:6,7 260:19 265:4 269:3,12 273:10 280:9 288:5,20,24
---	--	---	---	---

290:6 291:16	behavior 100:24	bias 43:7 44:13,21	bracketed 239:3	88:21 90:20,21
292:17 314:22	belabor 261:15	44:22 47:10 62:23	bragged 199:13	91:10,18 106:21
BASF's 19:25 24:5	belief 84:6 107:24	bidding 56:2	brain 122:7 293:17	106:25 107:2
42:7 53:17 64:23	108:6 110:10	big 120:7 173:21	brand 47:4	108:9 110:22
87:9 88:4 89:3,22	174:24 195:19	binder 118:20	breach 43:18 45:22	136:4,11 146:20
89:23 90:23 91:9	224:6	173:21 174:1,3	54:22	167:6 173:20
basically 12:3 24:4	believe 8:16 15:10	269:8 318:8	break 82:4,5 186:25	182:21,24 197:17
124:13 247:12	60:14 63:15 76:9	birthday 58:10	203:19,21 204:7,8	198:4 201:21
258:4 286:24	78:19 102:2 103:2	Biscuit 222:12	207:12 231:8	214:10 218:1,6
basis 10:1 48:10,12	107:14 108:11,12	Biscuits 216:14	247:7	219:24 226:17
49:4 53:24 59:25	108:24 109:9,16	219:2	Bress 2:11 4:23,23	228:12 229:10,14
82:24 84:6,13,15	109:22 110:17,21	bit 41:23 44:18 80:6	64:25 65:1,1,6,11	230:16 231:23,25
84:21 89:19 92:9	112:2 119:23	80:14 94:20 96:1	66:9,13 67:6 68:6	233:10 238:3
104:11,17 108:4	130:14 142:5	117:24 136:2	69:12,15 70:20,25	280:20 281:1,2,4
108:12,18 109:2,9	154:2 156:13	140:1 185:20	71:4,13,21,24,25	281:15 282:22,24
110:10 113:3	162:9 163:16	235:9 280:17	74:5 81:24 204:13	286:4,5 287:3
145:9 174:16,20	172:13 175:2,3	295:12,13 307:13	205:6 206:10	304:2,22 306:3,6
174:23,24 175:17	179:11 180:23	311:2 313:2	210:13 211:11,13	briefed 36:13
179:19 180:17,20	181:7 184:18	black 58:15,19	211:14,15,22	briefing 228:13
181:1 198:13	188:21 189:5,8,19	blackmail 147:20	212:2,16,24	306:15
199:22 208:13	194:4,11 198:16	blame 43:25 51:17	213:14,20 215:2,4	briefly 240:22
220:6 222:2 224:5	208:3 210:18	54:6 57:8 65:20	216:5,8 217:18,24	265:16
224:5 235:3	222:2 237:15	68:21 136:21	218:5 220:19,22	briefs 17:14 88:9
246:25 249:6,19	239:7 250:10	185:24 306:9	220:25 221:2,23	286:7 299:18
250:10 255:5	259:4 263:11	blamed 68:10	224:10 225:8	301:8 306:18
259:4 263:19	266:2 267:7	185:25	226:3,6,13 227:12	312:13
265:12 271:2,20	274:19 280:1	blaming 182:25	227:17 228:1,3,7	bring 19:2 80:11,13
274:14,16 276:12	305:10,13 313:25	305:2	228:18,23 229:23	198:8 206:1 209:5
276:13 277:1,5,9	believed 9:7,11	blank 65:12 267:6	230:3,9 234:9,10	238:10,22 245:21
296:15 303:13	272:1,12	blind 60:2	234:14,17,24	245:23 246:25
Basketball 203:12	believer 56:19	block 215:7	235:1 236:2	285:6 286:19
batch 317:25	believes 224:20	blood 22:9 122:7	237:13,15,19,24	brings 271:11
Bates 118:6 184:7	250:23	blow 313:7	238:16,17,23	broad 56:4,8
201:19,21 239:20	believing 161:21	board 283:25	239:15,18 240:8	broaden 95:14
240:10 267:11	belong 180:4	boasting 175:18	240:17 241:16,21	102:5 202:20
269:11,12	bench 281:22	Boccolini 1:12 319:4	242:13 243:14	217:20
battle 159:14	benchmark 99:4	319:18	244:24 245:2	broadly 95:23,24
bear 51:22 62:20	benefit 253:25	Boise 2:16 5:8,8	246:10,14,23	99:6 102:7
75:12 76:10 88:16	best 80:24 205:4	72:12,14 74:15	247:15 248:19	broke 291:21
103:1 153:23	218:22 236:25	76:11,12 77:5,17	251:1 252:7,16,19	brought 10:25
235:21 305:21	259:18 307:18	book 36:2 100:21,23	253:3,6,9,10	13:21 127:4
bears 63:19	better 79:12 94:20	101:21 230:5	254:2,12,21	255:11 260:8
beating 24:13,16,18	105:20 164:12	bootstrap 249:18	256:22,25 259:17	brunt 147:11
beech 310:9	213:24 215:10	borne 222:6	261:11,15 262:17	bubble 124:14
began 238:24	270:23 271:18	boss 130:15,18,18	268:2 282:25	build 68:22 69:1
begets 77:24 78:20	272:2,4 287:22	bottom 118:7 128:4	286:9	111:17 260:11
beginning 23:7	314:5 317:10	163:20 190:7	Bress's 286:4	building 127:21
120:13 195:12	Bevan 25:20 26:5	266:23	brethren 230:25	built 260:12
200:23 271:3	27:8,19,20 28:12	Boulevard 3:6,10	brief 7:17,23,25 8:2	bunch 186:11
begins 270:19	29:15 31:6,13	bound 76:8	8:5,7,9,13,15,17	223:17,20 269:13
begs 294:13,16	35:10,13,15,22	box 134:10 176:1	8:25 12:17 13:20	burden 63:9 89:2
begun 66:1	36:18,24 37:3	200:22	14:17,20 15:1,13	108:18,19 109:3,3
behalf 5:18,21 37:12	40:2,6,8 152:24	boxes 241:1	15:19,21 16:15	109:6,8,17,20,22
103:17 203:18,24	152:25 317:13,14	Boyle 3:9,11 5:20,20	17:13,17 36:17	111:9 210:24
211:16,17 249:1	beyond 76:18 109:5	5:21	83:22 87:25 88:12	240:6 250:9 288:6

304:14 buried 160:19 165:23 297:10,10 297:24 bury 228:2 bus 178:16 business 207:19,19 buttness 145:24 buy 115:10 116:12 117:3	288:21 289:4,12 289:14 292:7,17 314:22 Cahill's 64:15 calculations 134:7 277:13 California 135:19 140:25 189:4 call 36:8,9 39:5,12 61:3 62:5 76:8 130:4 186:7 187:20 207:7 226:19 247:23 275:9 281:21 286:7 304:23 called 17:19 135:20 141:7 155:21 158:20 212:15 216:14 271:8 275:16 calling 140:16 calls 204:5 camera 45:1 46:22 62:14 63:11 84:10 84:21 86:9 88:2 108:2 110:11 195:16 201:13 218:22 224:8 247:14 cancer 276:8 candidly 48:7 56:11 57:23 58:11 80:15 197:14 candor 10:6 71:9 capabilities 264:23 capacities 291:4 card 277:22,24 284:18 cards 61:13 care 57:1 131:22 211:23 212:5,6 231:5 262:1 career 212:4 293:22 carefully 118:12 carried 289:15 carriers 120:14 carries 16:5 cart 226:2 308:14 Carter 145:24,25 146:1,3,12,15 152:6 166:20 186:3 294:21 311:21 312:8,10 Carter's 152:10 311:24 312:9	case 9:2,22 11:17 17:5 18:23 20:14 20:15,22 24:25 25:16 27:20 28:12 28:25 29:16 31:19 31:23 32:11,13,15 35:14,16,17 38:13 39:19,22 42:18 44:24 48:20 52:8 52:23 53:9,16 55:13,15 56:9,10 56:25 57:4,4,20 58:8,9,12 59:6,19 61:6,7,16,17 63:17 64:2 65:24 66:11 67:11 68:10 68:14 69:17,21 70:4,11 71:22 73:4,15 75:3 77:22 79:2,4,11 80:14,19,20,21,21 85:10,25 90:3 92:7,19,20,23,24 94:22 100:9,15,17 100:22 101:11,16 101:18,21 102:10 103:21 104:2,18 104:19,22,23 105:2,12 106:10 106:17 107:15 109:25 110:3,19 112:2 116:22 121:25 123:22 126:11 135:12,20 137:8,14,21,23 140:21,25 142:11 142:14 143:4,24 144:1,3,8,12,17 146:19 148:1,3,3 148:8,22,23,23,25 149:10,18,19,20 149:23 150:17,21 150:25 151:12 153:3 155:20,21 155:22,23 156:19 156:20,23,24,25 157:2,3,5,6,10,19 158:19 160:4,19 161:11,15,18 162:18 165:2,14 165:17,19,22 170:11 175:22 179:5 183:22 189:4,16,18 191:3 195:25 196:18,20	197:11 199:23 200:6 206:22 208:1,11 209:1 210:18 211:3 213:25,25 214:1 214:22 216:1,14 216:17,18 218:9 218:16 220:9,11 222:7,17 223:1,10 225:12 226:1 227:13 228:10,21 229:9 230:13,18 232:15,24 233:7 233:12 239:2,9,23 243:15,15,17,18 243:23,24 246:16 247:2 248:5 250:2 253:16 255:4 256:1,2,9 257:9 257:15,16,24 258:5,13 259:2,4 259:20 260:11 263:1 269:10 282:9,15 283:13 284:3 285:1 292:16 295:1,2,2 295:3,3,4,5,6,15 297:15,17,17 298:2,3,3,6 299:24 300:21 301:14,22 302:10 303:1,16 305:14 306:22 307:2,24 308:7,10,14 309:15,22 311:15 311:15,15 313:20 cases 26:7,12 35:11 37:5,8,12 46:21 49:23 67:7 68:19 85:16 87:1,2,3,4 108:25 109:17 143:6 150:22 152:20,22 153:1,4 153:6 155:15 163:16 170:18 199:13 215:11 221:18 222:8,12 224:21 232:18 233:17 240:18 248:8 249:1,5 256:3 258:10 260:2 292:1 299:16 306:17 309:25 311:22 312:4	cast 290:13 cat 316:20 cat's 66:15 Catalyst 52:4,5 Catalysts 1:6 2:13 2:24 3:4 catch 251:2 Catch-22 242:7 309:8 catch-all 217:22 catchy 130:8 caught 263:10 275:14 cause 17:21 67:16 67:22 112:23 113:2,3,24 153:16 caused 51:20 52:3 80:7 cautious 286:2 ceiling 121:11 cement 51:12 Center 3:3 central 71:13 141:11 222:23 240:8 245:3 260:7 certain 26:2 28:15 57:7 193:19 241:2 271:7 292:7 certainly 14:12 15:14 16:3 72:15 83:25 182:10 218:16 219:5 259:15 280:6 Certificate 319:1,19 certification 72:18 79:9 80:1,18,21 80:25 81:2 87:25 96:2 190:17 certified 1:12,22 94:24 96:21 319:4 certify 319:5,9 certifying 96:16,17 chair 50:15 challenges 29:5 champion 4:3 chance 228:13 change 243:2 changed 45:10 59:12 65:16 261:23 changes 59:13 characterize 10:20 characterizes 275:16 characters 290:14
--	--	--	---	--

charge 111:6 168:24 199:7	Circuit's 77:16	68:5,17 76:1	club 310:21	198:14 245:10
charged 59:20	circular 309:12	82:13 86:13 87:16	clue 242:1 294:7	253:7,12,21 254:6
Charles 166:20	circumscribed 219:14	87:22 90:20	co-counsel 235:6	255:6
charm 250:3	circumstance 49:16	229:18,20	codefendant 48:21	committed 219:1
chastised 48:13	circumstances 12:7	clarification 211:9	49:20 53:11 77:23	225:13
Chatham 3:10	12:8 47:2 60:13	282:7	codefendants 42:7	committing 84:16
check 119:13	63:16 64:2 67:19	clarify 117:6	44:7 49:2	92:10
149:10 150:6	86:19 94:17 95:21	clarity 217:25	codified 82:17	common 36:15,18
172:5 317:23	97:11,17 102:11	Clark 162:18	coexisting 258:17	213:24
checked 172:3	102:16 111:10	class 25:4,15 27:18	Cohen 2:2 4:7,11	communication
checking 118:16	196:2 200:9	27:21 46:5 72:18	25:16 35:21,24	23:8 25:14 28:8
checklist 316:16	237:16 242:20	79:9 80:1,17,21	coincidence 164:2	29:11,14 31:4,10
cheek 153:12	285:21	80:25 81:2 246:4	cold 256:14	33:15 45:21 82:21
Cherish 40:24	circumstantial	246:17,18	collated 187:8	84:17 93:10
Chernick 148:1,3,8	243:21,25 244:2	cleanly 192:10	collateral 40:4	148:25 150:9
148:22,22	244:18	clear 29:12 92:14	colleagues' 53:16	188:11 191:11
Cherry 1:16	citations 74:23	97:3,16 109:4	collected 302:23	216:3 219:18
Chevron 220:10,20	84:24	136:9 182:20	collection 176:5	communications
Chidester 11:18	cite 44:3 48:14	193:11 199:22	collectively 203:25	24:24 26:4 79:16
143:24 144:14,17	143:9 289:20	257:5,6 292:20	colloquy 28:5	79:19 83:14
144:23 145:10	cited 11:21 15:11,12	298:6,8,8 302:20	209:19 311:19	220:13 225:15
Chidester's 11:21	16:6 45:16 65:24	clearer 234:5	color 192:16	241:4,7,8,9
144:5	95:5 132:14	clearly 11:19 26:22	colorable 179:14	260:22 261:1
Chief 26:21 212:14	218:16	77:4 143:25	columns 132:11	companies 141:18
282:2	cites 11:16	152:20 160:17	come 33:15 36:12	company 55:23
children 310:12,15	citing 48:13,15	210:15 216:25	40:7 51:11 52:17	268:21 272:1,12
chilling 61:12	92:22 118:4	217:15 219:7	55:22 58:7 59:24	275:11 291:18,18
choice 60:20 66:24	150:20 151:5	221:25 227:17	66:15 70:5 97:21	291:19
73:8,10,11,14,21	309:25	245:11 257:6	118:18,21 126:19	company's 271:21
74:8,12 75:2,5,14	civil 1:2 24:7 33:19	clemency 237:10	162:8,21 164:6	comparative 47:7
75:19,23 77:7	45:4 46:4 47:1,13	clerk 85:21 87:6,11	181:15 185:16	51:2 70:1
229:1,2 230:23	claim 6:25 26:23,25	Cleveland 33:16	200:4 235:23	compare 184:14
231:21 282:11	27:5 29:1 43:7,13	client 26:19 29:10	236:25 239:5	compared 172:17
choices 229:17	44:14 55:1 67:9	29:12,12 32:20	240:19 249:15	compel 41:23 42:2
choose 100:5 110:14	67:20 69:2 72:16	45:22,23 55:10	262:21 280:15	42:13 45:8 46:16
132:19 181:16	85:14 86:11 88:25	77:12 102:21	281:8,9 282:21	compelled 44:11
chooses 107:18	89:3,6 111:23	103:7,8,10,12	285:7,13 287:14	compelling 224:22
chose 102:6	112:20 145:24	211:17 216:2	296:22 303:3,9,19	compels 90:12
Chris 4:13 212:1	149:3 202:15	242:20 247:3	311:23	competent 265:8
CHRISTOPHER	210:22 225:20	251:4 254:17	comes 36:16 69:8	280:7
2:4	226:22 231:16	255:19 260:9	73:7 146:3 187:25	compilation 136:12
chrysotile 120:22	234:1 247:24	271:3 276:4	258:3 317:11	136:17 146:9
137:6 138:16	256:21 257:1,2	client's 56:2 86:6	comics 212:1	176:7,8,9,13,18
277:7	268:5 279:9 304:1	213:9 218:25	coming 35:7 36:4,10	177:24 178:2,23
circle 306:12	claimants 146:17	245:4 247:18	38:8 73:16 78:16	179:7 180:16
circles 61:15 128:14	claimed 75:21 82:15	249:7 253:4	commencing 1:13	181:8 183:10
261:12,14	90:12 105:18	clients 26:5,10,11	commend 306:14	201:7,8,23 202:3
circuit 58:23 74:20	246:18	38:18 45:17	comment 186:19	210:22 300:23
74:25 75:7 77:9	claiming 66:3 90:16	208:25 219:18	comments 65:3	301:19 303:21
84:25 93:4 103:22	255:21 260:20	223:19 250:11	238:25 287:19	complaint 228:16
215:14,17 221:4	280:12	close 32:17 82:1	Commerce 2:3	228:17 250:18
222:4 248:16	claims 27:4 37:20	135:18	commission 82:23	complete 152:18
295:3,10,11	38:13 42:17 43:18	closed 129:14	93:11,15 215:12	167:15 202:13
311:17 312:5	43:19 57:6 67:15	closing 114:19	215:24 235:18	completely 11:22
		cloth 251:18 269:2	commit 84:16 92:10	225:1 249:17

282:4 complex 40:8 complicated 74:4 complicity 102:21 compliment 118:23 284:12 component 219:17 compromised 131:17 299:16 conceal 163:10 concealed 89:7 232:17,25 233:22 concealment 92:20 112:21,22 113:9 148:23 161:14 concede 85:12 conceded 40:15 223:12 concentrations 257:12 concern 13:22 164:16 291:16 concerned 106:19 161:2 231:2 236:12 concerning 55:10 83:18 262:15 concerns 80:15 concessions 40:18 conclude 200:4 concluded 128:20 conclusion 70:5 143:15 162:21 164:6 227:20 244:7 247:2 271:5 271:5 287:15,17 296:22 299:13 302:6 conclusions 11:4,24 106:6 concocted 292:9 condition 70:17 137:12 157:21 conditions 57:24 condone 304:12 conduct 48:22 53:11 60:22 114:13 conducted 85:14 296:21 conducting 45:5 127:19 confer 45:5 47:1 235:6 conference 1:11 91:1 318:23	conferences 199:8 confident 315:12 confidentiality 62:13 257:17 confirm 150:7 confirming 283:25 conflating 14:22,23 conflict 86:20 conflicts 45:16 confront 291:24 confusing 234:4 confusion 136:2 Congoleum 133:6 134:2 277:14,16 conjunction 146:16 connected 267:8 connection 204:23 215:18 262:19 connects 258:17,19 consequences 125:11 consider 91:17 103:25 104:11 283:8 considerations 247:8 considered 12:12 55:8 202:19 consisted 87:24 consistent 123:9 145:20,22 314:15 consisting 88:3,5 consolidated 238:2 constantly 121:3 constitutes 85:7 constitutionality 86:21 construct 142:22 construing 215:7 consult 230:24 consultation 254:18 consulted 54:1 consulting 161:19 contain 7:6 145:14 244:12 276:11 contained 7:3 89:8 90:18 102:2 257:11 containing 258:12 contains 143:13,14 268:13 contaminant 126:22 contaminated 53:21 contamination 142:25 152:4	contemporaneous 276:14 contempt 20:8 33:9 33:20 contents 173:1,7 242:10,11 context 76:14 101:18 112:17,18 134:8 142:20 184:10 185:17 189:10 214:20 276:1,3,5 continue 19:10,21 195:6 211:12 227:23 290:6,7 continued 2:1 19:11 19:15,22 25:8 30:7 38:11,14 39:1 114:12 136:15 206:15 251:21 290:7,10 290:10,11 continues 312:14 continuing 206:17 continuity 292:19 contract 216:20,24 217:3,4 contracted 276:7 contradicted 222:7 222:8,11 contradicts 97:19 264:7 contrary 96:19 209:4 contrast 271:8 272:11 contribution 43:23 44:1 49:18 51:2 70:2 control 52:6,9,14 132:2 conversation 28:21 36:1 236:19 238:24 305:6 316:16 conversations 26:9 27:23 32:13 convince 126:13 146:17 153:3 convincing 109:5 199:23 cooked 260:19 cookie 212:9 cookies 212:10,12 cooperatively 38:25	cooties 192:25 copied 9:8 166:4 copies 18:22 141:9 167:12 168:3,4 281:11 copy 9:15 19:19,23 161:17 182:14 269:6 314:16,17 core 17:5 69:6 313:8 Coren 2:5 4:16,16 24:11 27:8 47:21 48:1,2,4,12 49:3,6 49:21 50:8,12,23 50:25 51:8,25 52:16 53:1 54:17 55:18 56:14,23 57:3,14,21 58:16 59:9 60:14,18 61:1,5,21 62:1,5 62:17 63:15 64:14 64:22 66:3 72:2,4 74:17,18,19 75:6 75:9,11,16 76:2,6 77:1,20 78:3,6,12 81:21 114:18 117:21 188:8,12 corner 190:7 195:1 256:14 261:7 266:23 Corning 95:2 corollary 79:14 coronary 149:13 corporate 1:15 151:20 154:7,11 167:20 176:17 correct 12:15 42:24 51:8 62:5 71:21 75:16 90:22 93:1 93:2,5,16 95:16 98:4,21 119:6 126:21 129:25 131:2,15,18 134:3 135:17 137:4 138:11 143:12 144:6 148:7,10 150:16 151:1 155:3,6,11,19 159:23,25 163:14 166:18 169:7 173:2 188:4,7,8 190:15 191:12 209:18 221:25 224:11 225:16 226:3 246:8 249:25 266:14	267:25 269:21 270:8 282:12 312:13,25 correcting 13:19 correctly 264:13 314:18 correlation 187:10 correspond 189:14 couched 122:20 175:16 counsel 4:5 5:18 17:2 19:16 20:1 25:21 26:2 27:6 35:25 37:5,11 38:1,24 53:20,25 79:16,19 83:14 87:25 96:15,16,18 148:25 152:20 166:3,8,24 176:16 176:21 206:15 208:6 211:4,17 216:19 239:21 242:22 244:11 319:10,12 counsel's 217:14 219:7 counterproductive 208:20 counting 120:24 300:22 country 222:3 couple 12:19 13:18 106:22 111:13 132:25 135:21 153:8 173:23 177:16 185:12 204:5,16 255:20 265:14 280:19 286:16 293:24 course 82:22 90:7 92:12 93:10 106:23 122:4 124:11 145:19 146:8,10 193:14 223:17 259:6 305:23 court 1:1,12,22 7:24 9:23 10:6 46:2,3 48:19 65:25 67:18 69:16 75:20 82:25 83:8 84:11 85:8 87:6,12 89:15 91:9,16,22 92:5 93:4 95:4,5,11 96:5 97:12 102:8
--	--	---	--	---

103:25 104:1,10 105:3 107:17 108:4,16 110:1 112:1 114:22 115:24,24 150:9 152:16 156:19 167:4 182:2,7 199:25 201:13 215:5 216:10 220:3 222:4 230:8 236:3,18 274:11 288:6 293:14 295:3 298:11 306:17 311:24 315:24 319:4 Court's 13:21 18:8 18:12 25:8 182:14 305:16 courts 57:24 62:24 89:8 97:20 110:23 110:25 111:5,5 124:4 146:17 151:3 175:12 199:9,11 206:25 220:1 290:11 294:18 299:15 311:16 covenants 44:6 cover 74:14 214:25 covers 219:10 coverup 98:3,13,20 crazy 314:11 created 161:10 creates 62:23 creating 186:2 creation 184:16 credibility 145:9 credible 145:10 credit 50:5,10 164:17 crevice 158:2 crime 6:10 8:13 11:7 14:10 17:4 53:14,15,18 64:8 79:20 82:7,11,23 83:15 84:16,19,23 85:5,13 86:3 87:20 89:3,13,17 89:25 90:1 92:10 92:14 93:7,12 97:23,24 98:14 107:15 110:20 111:19,21 112:6,7 179:5 198:14 199:23 210:19	213:1,8 214:3 215:10,19,21,24 216:2 217:6 219:1 219:10,12,13,19 220:7,14 221:4 222:5,19 224:23 225:7,13,17 232:4 232:15,23 233:20 239:13 240:13 241:5 242:16,17 242:19,24 245:3 245:10 246:2,5,8 247:3,6,17,19 248:22 250:12 251:3 252:22 253:8,12,19,22 254:3,6,14,16 255:6,15,16 259:20,21 261:16 264:1 296:25 302:10,11,12,15 303:3 309:18,23 311:16 313:17,21 314:6 315:14,17 cringe 101:19 critical 36:23,25 254:15 cross 285:6 cross-claim 48:24 49:5,8,9 52:22 cross-claimed 52:24 cross-claims 42:20 52:25 cross-examined 122:5 cross-over 311:20 crystal 257:5 crystallize 213:5 cure 228:16 cured 228:15 239:14 current 89:13 208:25 currently 10:23 customer 249:13,23 277:13 278:20,25 279:10,11 customers 115:11 116:7,15 119:14 120:10 198:25 247:25 248:4 251:11 279:3 288:18 cut 53:4 59:6 107:5 118:8,9 238:20	cuts 61:8 101:13 <hr/> D D 3:8 16:14 88:2 D.C 2:10 Dalmet 2:12 4:25,25 damages 20:25 33:24 52:2 67:23 233:14 Dan 4:23 65:1 211:14 dancing 310:24 dangerous 284:6,9 dangers 116:10 DANIEL 2:11 Daniels 162:19 dark 195:1 256:14 261:7,7 darn 130:17 data 117:1,9,13,25 118:2,3,5 119:7 119:10,15,21 121:5 138:18 146:5,8,11,14 167:15,17 168:25 168:25 175:10,12 266:6,8,9 267:1,4 267:5,15,18,22,23 268:6,12 269:3,16 271:2,4,6 289:17 290:3 294:22 295:18,23 297:5 298:8,21 date 1:12 15:11 66:2 81:20 115:17 130:11 187:24 188:14,23 189:9,9 235:23 236:1,20 237:4,6 267:5,6 267:16,22 319:7 319:19 dated 19:18 275:19 275:22 dates 20:10 38:17 267:13,18 317:3,3 daughter 128:24 David 162:18 day 21:2 22:14,17 23:11,21 47:18 48:5 153:18 221:11 260:4 263:8,8,10,13,15 264:16 281:17 283:11,14 285:15 286:17,17 295:20	296:12 299:14 days 8:12 19:15 33:20 80:13 185:12 187:16 272:15 de-privileged 159:13,17 deadline 315:7,12 deal 91:1 146:1 184:11 185:17 225:4 286:3 dealing 28:3 80:24 Dear 193:20 debatable 123:24 debate 106:16,16 123:4 debating 122:16 decide 72:21 92:5,5 145:8 229:3 260:11 decided 10:16 86:17 315:4 deciding 58:23 281:16 decision 32:14,15 49:13 72:22,23 82:25 97:17 107:19 200:7 281:17 291:20 298:20 decisions 26:6 61:10 declarant's 312:25 declaration 42:13 264:21 272:21 Decof 162:17,20,24 163:3,25 164:1 deem 201:13 deep 195:1 289:18 deep-six 243:8 default 73:6,12 defend 55:19 defendant 2:13 3:4 3:8,11 4:22 48:20 49:18,19,19 50:5 50:6,10,11,15,19 53:10 67:9,10,10 67:13,19,20 68:1 68:4,13,13,20 70:7,11 77:22 87:12,14 150:1,2 170:20 216:21,23 defendant's 44:13 68:1,2 82:12 86:20,25 defendants 1:6 2:18	5:7,9 18:16 42:13 42:16,20 43:3,8 43:14,24 45:24 46:8,8 47:6 48:8 52:8,22 58:4 60:8 60:20 64:10 72:21 89:6 100:13 101:12 124:10 163:2 232:19 250:2,3,4 258:21 defending 248:25 defense 42:5 51:24 52:1,2,15 89:24 161:20,21 163:23 164:1,6 209:1 217:10 237:5 defer 316:8 deficiencies 90:22 deficiency 239:11 deficient 183:8,8 define 79:10 307:7 defined 219:15 233:1 defining 270:3 definitely 219:6 318:11 definition 73:5,5 84:23 199:24 defraction 289:21 defraud 258:20 260:18 degree 28:2 251:25 delay 12:8 deliberate 85:9 delineating 215:18 delivered 277:15 278:20,23 279:10 delve 51:18 demanding 99:4 demands 116:16 Dembrow 90:11 190:22 191:5 194:16 demonstrate 36:14 114:14 141:25 223:16 250:9 demonstrated 174:22 175:4 197:10 198:18 199:20 219:17 313:9 demonstrates 160:17 301:13 demonstrating 90:16 95:2
---	--	---	---	--

denial 42:21	261:6,8 292:15,24	195:17 296:15	diligence 164:9	318:15
denied 15:19 17:17	293:3,12 311:25	determine 82:11	direct 76:22 243:20	discussed 6:4 28:24
42:8 45:9 47:4	317:4	87:20 89:16 92:6	243:22,25 244:3	29:1 31:11 41:10
80:18 81:17	Desai 2:22 5:3,3	110:7 195:24	directed 80:24	179:22 234:2
286:18	207:12	201:2 282:17	246:16	271:9 289:16
deny 38:21 80:7,9	describe 27:19	298:7 308:6,10,13	direction 215:24	316:17
denying 22:15 91:17	72:22 100:24	309:22 310:8	directive 237:25	discusses 274:20
department 130:16	described 38:23	determined 11:4	directly 85:22 87:7	discussing 23:23
130:20 154:25	64:12 158:21	88:24 268:25	87:13 96:19 102:2	87:2 273:23
291:14	160:11 264:13	determines 77:8	disadvantage	300:10
depending 135:24	describes 99:5	determining 272:12	230:19	discussion 38:6
136:25	descript 184:2	developed 43:15	disagree 15:22	75:15 77:7 195:6
depends 125:8	description 64:11	128:24 187:16	21:17,20 56:5	196:19 209:20
deponent 154:14	135:4	218:13 256:17	58:18 61:22 62:8	232:20 306:13
depose 246:25	deserve 223:21,22	258:21	225:8 255:14	307:4
deposed 9:1,3,5,6,7	deserved 24:17	developing 258:10	311:11,13	discussions 35:9,13
128:22 172:13	deserves 102:24	development 217:8	disagreement 70:21	35:21,23 193:16
173:13 245:20	designated 155:4	diagrams 128:14	disavowed 245:9	dismiss 76:14,18
312:9,11	designation 90:4	dictionaries 222:10	discernible 121:22	153:4 258:13
deposition 6:24,25	163:12	dictionary 307:7	disclose 44:6 45:25	dismissals 111:3,3,4
7:11 8:1,9,11,15	designed 256:3	difference 24:18	46:10 63:8 66:25	199:13 290:12
9:12,14,19 10:8	despite 164:25	100:7,7 134:18,22	67:2 71:15 108:3	dismissed 67:13,20
11:16,17,21 15:12	300:9	144:13 181:25	275:25	67:24 68:4 148:13
16:2 18:5 19:9,11	destroy 7:9 25:22,24	213:19 221:3	disclosed 26:17	150:4 152:21,22
19:15,22 21:13,15	27:1 302:18,19	254:9 307:9,12,14	43:16 68:20 185:7	153:1,6 155:15
21:22,25 22:3,19	destroyed 86:8	313:22	201:16 202:16	295:6
22:21 23:18 25:3	111:18,20 112:6	different 14:23	256:13 289:9	disposed 29:2
25:4 28:5 29:23	139:7,8,9,9,20	56:18 60:6 67:7	305:12	disposition 91:11
30:7 32:18 33:13	140:19 188:21	68:18 70:10,14	disclosure 26:14	dispute 31:24 283:9
33:17 34:14 36:6	197:1 226:25	80:19,21 89:21	47:8,8,12,14	disregard 229:25
38:11,14 39:2,15	232:21,22,25	96:1 101:20,23	61:19 65:19 66:3	296:5
123:18 128:25	233:11 301:9	102:10 104:17	68:8 71:2 82:15	dissuade 109:1
130:21,25 136:5	destroying 140:23	125:12 136:13,17	86:15 210:25	distill 285:8
136:15 143:23	destroys 36:2	137:7 141:18	239:25 240:1	distinct 233:18
151:16 154:14,23	destruction 13:2	143:19 145:22	disclosures 249:13	251:19
156:18 167:20	33:6 85:1 111:13	162:21 171:1	256:10	distinction 214:2,14
169:18 171:21	113:10 130:2	183:1 192:15	disconnect 242:15	243:19,20 254:9
172:14,18 173:1	141:22 189:1	212:23 218:10,17	279:9	271:17 273:7
173:15,22,25	226:18,19 303:8	221:5,20 222:5	disconnects 243:19	278:7,8 307:11
189:24 190:14	303:18	223:23 224:16	discontinued 141:10	distinguish 46:20
194:1,17 277:12	detail 110:21 142:18	241:10 244:21	discover 57:18	District 1:1,1 75:20
311:24	169:13	247:8,10 249:17	discoverable 96:9	diversity 69:21 73:4
depositions 11:22	detailed 173:10	256:21 259:14	217:6,9	divide 26:3 313:17
71:22 90:11	detailing 173:11	260:6 267:18	discovered 8:3 10:4	Division 91:12,16
137:20 138:3,4	detection 123:23	272:3 279:22	128:24 196:15,18	91:21 104:1,10
169:8,9,24 170:1	125:4,6	281:24 299:12	discovery 48:6,22	105:1,15 216:15
170:5,9,10 183:18	detente 32:25	302:8,11 306:16	53:12 58:10 59:10	217:5 220:4
183:18 191:4,14	determination 17:3	313:6	59:25 60:10,22	docket 82:10
191:17,19,20,21	17:8 79:1,15	differentiating	66:1 68:12,17,23	document 15:23
191:23 192:1,4	81:15 107:20,23	272:19	78:22 79:11 81:6	86:8 90:2,4 117:7
193:11,12,15,19	110:5 112:14	differentiation	81:10 161:14	117:11 119:8
193:21 194:13,15	145:3 228:21	121:9	236:20 237:4,6	130:1 132:8
194:21,24,25	240:5	differently 34:21	315:6,11,11	141:17,22 161:17
195:5,8,11,13	determinations	41:23	discuss 6:7 28:15	161:24 162:3,8
199:7 257:5 261:5	63:12 112:16	dig 175:21,22	268:21 274:18	163:7,13 168:10

173:7,16 178:6 179:22 181:12 189:11 207:13 217:6 219:4,6 226:17,24 240:12 242:11,12 243:12 253:16 259:11 266:21 268:20 269:4 271:24,25 272:1,6 273:3,13 274:2 275:15 documented 156:17 documents 7:10 9:8 13:2 18:15,21,22 26:14 42:15 43:17 47:15 83:18 86:1 86:1 88:1 89:16 90:3,13 91:13 107:19 110:4,14 111:14 121:1 127:18 141:9 155:12,17 161:13 167:22 168:2,14 168:17,18,19 169:18 176:12,19 176:20 177:17 178:2,5 179:13,17 180:20 181:7,9,14 181:15 183:6,14 183:24,25 184:15 184:21 185:7 186:9,12 187:20 188:19 189:9 195:24 196:14 197:1 200:7,8,11 200:20 201:4,7,11 201:12,15,23 202:4,13,15 207:15,18 209:12 209:21,23 210:5 210:17,25 211:3,5 211:7 212:25 213:7 214:4 218:20,24 220:6 223:9 224:8 225:1 225:23,25 226:20 226:23 233:11,15 233:22 239:12,20 239:22,24 240:4 240:16 245:12,13 246:19,21 247:17 248:10,18 249:18 252:6 255:1,1,25 256:4,6 257:21 259:14 260:6	263:24 264:4 267:8 268:4,9 271:10 274:22 279:5,25 280:3,5 280:8,10,23 300:4 300:8,9,14,15,18 300:22 301:9,13 301:23 302:18,20 306:23 307:2,23 308:2,6,9,13 309:5,6,9,16,20 317:14 Doe 243:6 dog 311:4 dogs 105:16,18,22 105:23 311:5,6 314:3 doing 6:9,13 23:5 54:23 56:2,24 58:11 141:19 153:5,18 185:12 204:10 209:14 212:11 216:18 232:10 251:23 256:9 260:24 262:6 279:11,13 292:11,12 304:10 312:1 dollar 53:2 dollars 207:16 domain 173:24 174:5 door 129:15,21 Dornbusch 3:11 5:21 59:21 68:16 90:10 142:13 146:16 176:15 196:19,21,23 291:7 301:18 Dornbusch's 146:10 181:13 double-check 119:16 double-checked 164:14 double-sided 177:13 doubt 38:9 39:17,18 109:5 dovetail 210:11 Dr 10:17,18 123:1 135:22 136:23 137:1,1,3 138:7,8 138:11,12 139:5,6 139:15 140:15 142:10 144:4,14	144:23 145:9,12 145:16,17 146:2 151:16 152:7 156:8,25 157:20 168:22,23,23 189:16 244:5,6 276:22 277:12 278:5,15 299:4,4 draft 161:19 drafts 216:20 draw 143:14 273:7 drawn 268:8 drew 11:3 274:20 275:6 Drive 1:15 dropping 231:16 due 15:21 164:8 259:6 314:22 dug 175:25 dump 278:22 dumping 289:3 duty 10:5 43:18 45:22 54:22 55:11 76:7 106:11,13 170:15,24 171:12 171:17 174:17,21 dying 161:6 <hr/> E E 16:14 88:5 90:25 157:12 233:24 240:24 e-mail 19:18 21:4,21 22:15,18,20 23:11 23:13,16,21 24:21 25:11 39:8 191:22 193:18,19,23 194:20,24 205:13 205:24 261:3 284:14 e-mailed 20:1 21:24 e-mails 22:24 25:9 205:17 317:14 Eagles 4:3 earlier 15:4 45:9 95:1 126:10 186:19 187:14 203:21 219:7 246:15 263:9 earliest 60:4 66:12 early 10:14 48:19 53:9 65:19 68:8 77:22 106:22 115:8 117:16 141:19 169:5	206:13 212:4 248:12 272:4 275:12 earnest 66:1 earth-shattering 19:1 easier 118:20 185:22 East 1:15 Eastern 301:6 easy 6:18 202:10 310:5,16 eating 140:12 ECF 6:21 7:12 19:7 20:3,12 23:25 42:1,12,21 45:2,6 46:14,24 82:10 85:20 87:5,10,18 90:19 educate 296:12 effect 33:11 50:21 110:25 238:25 258:11 effectiveness 208:19 effort 13:22 14:4 125:20 163:10 efforts 79:12 80:23 126:25 207:13 302:18 eight 90:9 134:13,14 either 40:16 60:21 67:9 68:12 97:19 109:4 112:6 144:24 229:2,18 231:22 237:22 281:1 282:3 302:12,21,21 303:25 307:21 315:24 Electric 116:8 electron 173:12 289:22 electronic 294:3 elegantly 252:8 element 91:4 213:13 220:12 222:23 245:3 elements 89:20 212:25 219:15 222:19 233:19 259:22 eliminate 37:4 Elizabeth 2:12 4:25 156:7 Ellen 151:21 169:17	Ellis 2:9 40:22 164:11,13,20 179:8,11 211:15 elm 310:9 eloquently 252:14 embodied 217:11 embrace 219:25 220:2 embracing 98:23 223:7 employee 319:10,12 empty 50:15 Ental 7:3 53:21 89:8 90:17 110:24 120:18 129:21 133:5 178:1 189:19 244:12 257:10 274:4 276:11,19 en 85:19 enacted 218:12 enclosed 19:19 encompassed 316:1 encouraged 317:6,8 encouragement 317:3,9 encourages 47:9 endeavor 296:14 ended 58:23 ends 81:7,10 97:6 engage 123:4 engaged 101:17 207:11 250:5,12 250:20 Engelhard 7:1,2 9:5 10:15 11:10,19 53:22 54:2 79:18 87:17 103:6 114:7 114:10,12,13,16 114:24 115:5 116:11,14 125:23 135:11 137:15 138:20 144:1 147:23 148:10 152:13 157:22 158:7 165:4 166:8 166:14,18,20 169:10 171:24 198:18 232:19 241:18,20 242:21 243:7 249:1 251:14 253:1,21 254:6,10,20,22 255:7 256:3,9 268:17 270:20
--	--	--	---	--

272:13 276:6	ESQ 1:16,17 2:4,5,5	124:6 126:12	213:21 246:7	61:24 127:24
279:1 289:13	2:6,6,7,10,11,12	130:14 138:4	267:25 270:16	169:20 173:5
290:14,23 291:17	2:12,16,17,17,21	139:7,25 140:18	275:3 278:1	execute 145:25
292:18 295:5	2:22,23,23 3:4,7	140:19,23 142:7,9	284:15 286:22	146:12
Engelhard's 53:20	3:11	145:13 156:12	293:6,23	executed 191:18
241:23,24	essentially 46:25	160:7,20 165:7,8	examination 108:2	executive 166:21
English 94:7	65:19 68:12 87:8	165:9,12 167:10	282:14	exercise 56:21
enjoy 101:5 212:2	106:24 219:11	171:13,18 174:9	examine 195:20	207:22
enjoyable 102:10	228:12 271:20	174:15,16,23	examined 172:19	exercised 313:13
enjoys 101:5	278:22	175:4,5,8,15,15	example 16:6 28:4	exhibit 18:5 118:1,2
enormous 247:5	establish 44:23	176:20 188:22	29:23 34:23 39:15	118:4 136:5,6,11
entered 19:8 20:4	208:11 226:1	189:1 197:10	51:19 62:18 65:9	136:14,19 173:21
41:25	established 92:6	199:11,12,14,17	94:18,22 120:21	177:2 190:7,13,18
entering 48:6	107:15 225:6,12	199:21 200:2,3,6	133:5 138:7	201:1 202:1,2,12
entire 116:9,22	232:15 233:21	208:12 214:5,16	151:16 171:19	266:3 267:2 269:5
149:19 178:23	306:21	219:5,8 222:18	172:9 184:13	273:16,19
182:7 224:2	establishes 110:3	224:4,20 225:21	186:11 187:21	exhibits 14:14,16,17
252:23	establishment	232:16,17 237:19	196:16 204:17	14:19 88:6 117:19
entirely 249:25	243:24	240:18 243:10,21	290:17 291:7	118:15 138:3
296:14 297:10	et 1:3,6	243:22,25 244:3	examples 115:23	169:9 171:20
entirety 168:14	ethical 193:4	245:16 248:20	120:13 146:20,22	172:18,21
entitled 38:1 47:5	EUGENE 2:11	250:10 252:20	146:23 152:15,17	exist 8:2 10:9,10,11
50:5 57:15 62:23	evaluate 57:22	253:14,14 254:4,5	166:2	10:12 39:1 43:4
66:19,22 67:19	230:18 294:24	255:4,10 257:20	exceed 88:12,15	44:25 112:16
73:23 78:22 90:6	297:7	259:3 260:9 268:3	314:22	114:4,5 142:9
145:8 226:23	evaluation 84:5,10	268:17 280:7	exceeded 89:1	172:19 175:13,13
252:4	201:13 260:15	288:24 290:9	excellent 106:7	175:14 176:22
entitles 57:13	evening 22:20	294:19,19,20	exception 8:13	191:20 301:20
entries 177:17	event 6:2 46:18	295:21,22,22	53:14,15 55:7,9	302:7 303:15
180:15 186:2	47:19 100:10	296:6,19,21	62:3,6 79:20,21	existed 7:4 9:12
187:24 188:25	events 72:23	297:20 298:6,8	82:16 83:2,16,20	10:8 113:24
189:6,14,17	eventually 74:6	299:9 301:22,24	83:25 84:1,6,8,22	124:21 181:14
195:21 200:21,22	159:6,10	302:5,6 303:8,11	85:6,11,13 89:3	193:11,12 207:18
200:24 201:2	everybody 6:13	303:13,15,15,18	89:13,17,18,20,25	213:24
241:1	22:24 25:11 68:24	305:11 312:15	103:12,17 107:25	existence 42:22
entry 177:10 189:21	73:17 141:21	evident 135:21	108:7 112:8 113:5	80:17 225:6
189:22 191:2	153:5 221:21	evidentiary 83:17	174:25 197:12,19	exists 32:10 294:20
192:3 194:4	296:13 301:20	85:13 112:16	197:24 198:5	308:14
200:23	304:17	181:23 183:17,20	202:16 214:3	exonerated 55:21
envelope 278:15	everybody's 6:14	218:13 248:14	215:10 217:7	64:15
equal 46:12 50:6	107:7 232:5	249:6,19 264:18	219:10,12,13,14	expanding 127:21
equates 85:2 222:9	292:25	311:18 312:7	221:5 222:5,20	expansive 199:24
equation 278:12	everyone's 80:23	evolution 40:13	224:6,23 239:13	expect 29:21 38:24
equipment 11:2	everything's 307:6	ex 63:11 84:9 85:14	242:5,16,17,19,25	164:12 208:6,17
127:9 268:24	evidence 7:2,4,9	86:10 90:7 108:2	245:3 251:3	225:10 235:18
equivalent 314:1	11:11 13:6 23:24	224:8 240:4	252:22 254:3,14	expectations 262:10
erase 7:7	51:17 82:19 83:5	247:14	254:16 255:16,16	expended 39:20
ergo 195:25	83:7,10 85:2 86:4	exact 114:12 130:11	259:20,22 261:17	expensive 285:24
Eric 2:7 3:7 4:7,11	89:22 90:16 106:2	187:24 188:13	274:4	experience 206:8
5:18	106:12,14 107:23	215:15 221:14	exceptional 12:7	experienced 121:19
Erie 69:23	108:6,19 109:4,5	278:7 293:2	exceptions 17:4 55:7	expert 9:4 11:18
Ernest 190:14	109:14 110:12	exactly 23:19 98:9	56:6,7 82:12	79:11 81:10
eschewing 91:2	111:20 112:6,9	113:15,19 134:6	87:21 112:19	121:13 122:1,6
especially 232:3	113:4,11 116:20	144:19 161:24	167:11 197:17	143:24 145:1
281:10 311:17	123:25 124:1,2,2	162:25 193:7	excuse 15:5 51:22	158:17 159:3

160:5 161:19,20 258:2 264:21,22 265:8 271:9 272:5 272:18,21 274:17 274:19 284:4,23 285:7 298:21,22 expert's 258:7 experts 163:4 280:7 294:24 295:18 297:21 explain 16:1 71:6 84:13 94:20 96:14 234:24 235:2 explained 105:21 215:23 280:10 explaining 23:14 123:2 223:8 263:12 265:8 explanation 15:5,18 240:20 279:15 281:21 explore 62:6 exploring 10:23 explosion 141:20 expose 96:24 exposed 113:25 114:22,23 extend 45:21 82:21 93:10 extended 236:18 237:6 extent 24:23 27:23 32:12,13 61:22 75:24 79:10 101:20 163:15 extra 131:22 extremely 288:9 eye 275:14	200:6 208:11 210:18,23,24 220:9,11 222:17 223:1,10,14 225:12 226:1 228:21 230:13,18 232:15,24 234:3 239:2,9,23 240:6 243:15,17,18,23 243:24 247:2 255:4 259:2,19 282:8,15 298:2,3 299:23 300:21 302:10 303:1,16 305:14 306:22 307:2,23 308:7,10 308:14 309:15,22 facilities 207:17,17 facility 131:4,6,15 facing 250:14 facit 228:10 fact 9:13,14 10:9 11:4 13:20 16:13 18:13 36:22,23,25 37:4 49:21 50:17 51:12 57:15 66:6 77:8,9 81:6 92:18 96:3,7,7 103:10 104:13 105:17 106:11 107:24 112:1 116:24 119:13 136:14 145:16 163:11 165:11 171:17 175:25 176:23 180:20 184:18 185:13 189:21 199:17 217:2 233:15 242:23 244:8 256:20 257:20 259:3 265:7 268:21 270:20 274:18,21 277:6,9 278:9,21 292:12 300:11 302:4 308:7 facts 26:5 58:1 59:17 61:9 62:7 62:10 76:14 96:3 96:8 98:7,9 103:1 103:9 124:18,20 206:23 217:8 223:17,20,21 224:17 239:1 250:19,22 254:1	258:16 259:10 280:1,4 factual 79:11 84:5 85:6 88:4 96:4 110:9 121:6 174:24 224:5 242:20 factually 78:20 86:13 failed 24:5 45:3 46:18 85:25 86:3 86:7 fails 212:21 223:10 failure 20:7 55:10 68:5 239:12 247:16 303:11,12 fair 14:8 17:6 27:17 30:13 35:11 41:7 83:10 86:21 109:14 120:5 134:7 141:1 166:16,19 167:16 174:23 180:14 187:18,19,20 197:10 224:1,4 225:21 250:9 260:15,15 288:24 316:5 fairly 211:2 315:3 faith 33:14 55:2 84:6 107:24 108:6 110:10 174:24 179:16 180:17,20 181:1 195:18,19 220:6 224:6 235:3 259:4 faithfully 56:2 fall 84:23 140:14 Falls 1:15 false 94:25 95:1 166:22 217:8 255:14,14,22 258:23 268:16,22 273:11 280:12 294:22 far 106:18 136:1 153:2 156:4 168:20 208:1 217:20 227:9 230:5 236:12 258:14 269:23 305:25 fare 19:3 Farrell 2:10 4:24,24 13:13,14,16,17	14:2,9,15 15:3 16:11,20 18:7,11 18:24 19:20 22:20 23:14 81:3 117:5 117:10,14 118:11 118:16,22 119:2,6 119:19 128:2,7 148:18,21 151:6,8 160:25 161:4,6,8 162:2,9,25 163:6 163:14 204:14 206:10 224:14 247:25 261:18 262:7,9,13 263:7 264:11 265:3,7,22 266:2,5,10,14,16 266:18 267:3,7,17 267:25 269:12,21 270:1,4,7,11,15 271:16 272:17 273:1,18,22 274:10,16 275:3,8 276:1,12 277:17 277:21,25 279:20 279:23 283:20 293:24 294:1 300:10 Farrell's 23:12 117:23 283:9 Fast-forward 216:22 fault 42:14 43:10 46:1,10,12 48:21 50:20 51:20 53:11 58:5 77:23 306:4 306:7 faulty 107:3 favor 189:25 229:8 favorable 223:18 favorite 212:1 fear 184:2 features 65:14 February 1:8 5:16 6:21 7:12 19:18 19:25 20:3,9,11 20:18 21:3,6,7,9 21:13,16,21,22 22:4,5 23:25 24:21 25:2 45:6 46:14,24 47:19 87:18 90:19 91:7 91:8 314:14 316:12 319:19 federal 23:23 46:3 47:13 65:24 69:16	69:22 87:1,3 92:16,21 116:24 117:2 150:12,17 222:4 306:16 feel 132:17 171:7 262:11 feeling 299:20 feels 78:9 307:20 Fellerman 92:23 95:22 97:12 214:21 216:9 222:8 felt 14:13 76:7 284:3 fiber 128:21 270:16 fibers 7:3 120:24,25 121:1,14 135:24 137:6 268:23 270:22 273:6 274:3,6 277:15 field 139:16 Fifteenth 2:9 fight 38:3 40:16 figure 160:22,22,23 185:13 205:23 307:19 figured 116:3 309:1 file 17:12,16 49:7 72:10 88:11 91:10 91:18 112:3 146:10 174:12 176:2,15 181:13 187:24 229:14 230:15 246:4,5,17 246:23 286:20 290:7 293:11 314:16 filed 6:22 7:13,17,24 8:5,7,9,12 12:16 14:10 20:12 21:5 24:1 37:21 42:12 45:3,7 46:15,25 64:11 67:16 69:1 82:10 87:19 91:8 135:11,13,19 148:14,19 150:11 150:19,21 151:10 151:12,13 155:20 165:6 170:12 182:21,24 192:5 208:1 210:4 212:21 233:5 246:3,8,11,12 263:9 293:10 304:13 files 9:11 10:10,11
--	--	---	--	--

10:12 95:2 97:18 122:17,17,19,21 141:11 161:12,16 168:23,25 170:18 171:25 176:14 filing 8:2 208:4 231:23,25 304:12 304:14 filled 116:25 final 47:17 82:6 104:8,15 174:4 313:15 finally 47:12 63:4 86:9 90:11 219:22 financially 319:13 find 18:1 33:12 40:9 57:8 62:12 68:1 103:16 120:14,16 120:17,17,19,21 141:5 155:25 168:18 189:12 191:23 192:1 244:22 259:6 273:15 282:14 302:11,12,15,16 305:22 finding 11:13 103:17 120:25,25 279:12,14 findings 139:10 172:24 273:6 fine 39:18 59:24 131:16,23 164:25 197:25 203:10 287:6 304:20 315:21 finger 43:11 63:18 164:20 firm 5:13 35:21 56:19 100:24 101:17 102:20,23 161:11 170:18 190:23 193:3,19 210:16 first 7:13 18:17 20:14 21:14 24:19 40:21,23 42:13 43:22 45:8 46:4 49:22 51:9 55:6 63:3 73:12 74:19 78:14 79:13 80:1 81:12 82:15 83:4 84:5 107:22 136:23 163:13 177:16 180:15	183:9 187:5,9,10 187:17 200:23 206:13 239:11 247:11,23 263:3 264:17 273:22 279:15 285:2 293:22 306:3 311:10 fit 198:2 fits 100:6 Fitzgerald 284:4 five 7:9 40:5 87:25 90:6 150:24 187:23 188:5 203:19,23 284:20 287:21 288:14 301:5 314:12,23 fix 291:21 flashed 240:22 Flattery 252:17 flesh 35:18 floor 1:11 3:3 48:3 92:2 121:10 flourish 206:19 fly 235:16 focused 87:16 126:24 278:7 279:4 focusing 79:13 folks 36:5 179:11 200:19 229:11 235:15,23 240:3 292:7 follow 65:8 282:20 following 45:8 53:18 186:18 194:12 198:18 201:12 230:12 follows 84:21 193:10 foot 119:1 157:8 footnote 83:21,21 83:22 90:14 136:10,11 178:11 178:13 197:16 foots 192:9 foray 51:9 forbearance 42:4 forced 138:20,21 foreclosed 67:3 foregoing 319:5 forest 310:4,8,14 forever 265:25 forget 6:1 133:3 257:24 263:6 309:17	forgive 17:23 79:17 forgot 165:18 233:8 form 30:25 34:4,5 50:18 139:25 271:20 276:7 formal 45:7 82:6 format 15:1 former 69:14 104:1 forms 120:18 formulation 218:11 221:19 forth 83:1 270:25 271:20 319:8 forum 73:13 forward 27:18 37:6 37:9,14 52:17 59:24 76:16 94:15 146:3,19 222:18 223:3 224:19 226:16 240:19 256:2,15 260:9 265:8 282:9 295:15 297:23 298:19 305:15 foster 57:24 fought 74:5 found 62:25 104:2 104:18 105:12 106:11 113:25 121:4,6 123:23 126:1,7 127:11 128:11 129:13 130:12 137:6 138:16 146:9 155:23 156:16 158:18 159:6 161:16 167:12,13 172:18 175:7 176:1,23 199:4 204:22 233:15,16 235:17 259:20 276:19 278:9 279:6 289:22 294:12 296:18 297:8 four 6:5 20:13 29:21 41:2,2 43:20 90:2 196:22 235:10 fourth 7:8 20:24 Fox 25:17 frame 185:2 189:2 framed 232:3 framing 252:20 frankly 9:21 10:5 16:14 18:14 23:19	34:1 36:14 38:12 129:1 164:12 174:4 175:18 185:12 197:18 263:18 280:12 292:21 295:12 fraud 6:10 8:13 11:8 14:10 17:4 53:14 53:15,18 64:8 79:20 82:7,12,23 83:16 84:16,19,24 85:5,7,13 86:2 87:21 89:3,13,17 89:22,25 90:2 92:11,15 93:7,12 95:7 107:16 110:20 111:19,21 112:6,7 113:25 114:7 160:17,18 163:9 179:5 196:15,17 198:14 199:23 206:15,16 206:24 210:19 213:1,8 214:3,5 215:10,13,19,21 215:25 216:3 217:6,15 219:1,8 219:10,12,13,20 220:7,14 221:4 222:5,20 224:20 224:22,23,24,24 225:6,13,18 226:8 226:12,21 232:4 232:15,23 233:20 239:13 240:13 241:5 242:16,17 242:19,24 245:3,7 245:10,15 246:2,5 246:8 247:3,6,18 247:20 248:4,7,22 248:23 249:12 250:12 251:3 252:22 253:8,12 253:19,22 254:3,7 254:14,16 255:6 255:15,16,17,18 259:18,20,22,23 260:3 261:17 262:16,18,19,20 262:22 263:25 264:1 268:16 271:3 296:25 297:25 299:24 302:10,11,12,15 303:3 309:18,23	311:16 313:17,19 313:21 314:6 315:14,17 fraudulent 89:23 92:20 112:21,22 113:9 142:1 148:23 161:14 free 142:25 freely 56:21 freeze 114:1 Friday 1:8 21:3,7 front 14:13 76:7 118:24 224:25 227:6,20 255:9 283:4 309:5 310:7 Fuentes' 77:3 full 41:11 100:1 122:5 141:7 144:17 270:18 278:22 fully 38:24 207:12 208:16 263:11 function 14:15 functional 314:1 fundamental 70:16 70:21 212:18 242:14 255:8 279:8 fundamentally 311:11 further 16:3 28:23 40:12 153:8 227:13,14 230:15 287:13,16 288:6 305:6 319:9 furtherance 84:18 86:2 87:2 90:1 91:4 93:13 94:2 94:11,13 95:7,15 97:2,22,24 98:3 98:14,19,23 102:4 210:19 213:1,2,8 213:16,18,22,23 214:1,8,11,15,17 214:19 215:7,8,13 215:21 216:11,15 216:16 217:21,22 218:2,6,10,17,24 219:19,23 220:7 220:13 221:9,13 221:16,19 222:13 222:23 223:5,6,13 225:17 240:12 241:5 247:17,19 255:18 260:21
--	---	---	--	---

262:20 280:23 306:13 307:5,8 furthering 248:3,7 futile 47:2 296:14 future 23:6 76:21 171:16 215:24 256:15 257:19	167:4 192:8 215:23 227:20 229:9,9 235:15 253:25 281:20 282:3 287:1 298:24 301:24 309:6 313:2 given 12:12 14:12 17:6 27:7 50:18 63:16,21 80:2 102:11 121:12 124:18,20 133:5 144:8 154:3 184:18 199:25 200:2,5,8 211:3 229:21 283:8 298:21 313:20,24 gives 43:23 51:3 214:24 giving 55:11 64:3 71:11 73:16 182:9 211:24 277:20 glad 164:13 211:8 277:17 Glassley 138:7,8,11 138:12 139:15 140:18,23,24 156:8,8,15,25 157:20 163:3 188:22 189:1,16 244:6 Glassley's 139:6,6 Glenn 128:10 130:15 136:15 go 19:4 23:9 27:18 27:20 28:23 41:21 51:18 56:22 57:5 63:1 69:5 81:12 94:16 99:11 109:11 110:6 115:14 120:12 128:15 136:1 142:18 143:17,20 145:24 151:6 153:7 168:10,20 168:21 169:12,22 171:22 172:5,10 190:1 195:23 200:5,6 207:1 216:9 220:9 225:24 227:8 228:10 231:7 260:2 282:9 288:12 291:22 295:14 297:22	300:2 307:15 308:3 309:10,19 311:4 314:2,11 317:11 go-around 78:15 goes 13:1 17:5 77:7 115:3 168:9 195:10 217:9 230:16 247:16 257:18 258:2 268:21 289:6,7 going 4:9 6:14 7:19 12:1 13:5,25 17:6 17:9,10 23:7 24:8 24:11 29:13 33:1 33:8,16 34:10,12 34:18 35:18 36:9 37:6,9,13 38:14 38:18,21,21 39:24 39:25 40:3,7,9 41:23 44:18 47:22 47:23,25 48:8,18 49:1,24 51:12,16 52:11,18 53:4,17 54:17,18,19 55:22 57:19 58:12 59:11 59:16,18,20,23 60:2,8,12 61:14 62:11 63:19 65:4 66:6,7,15,20,25 67:2,2 68:21,23 74:7,11 76:16 77:13 78:2 80:9 80:25 81:13 83:24 84:12 87:23 92:15 94:15 98:8 104:19 111:24 114:23,25 116:12 120:12 124:10 125:20 126:22 136:20 140:9,18,20 142:18 144:21 145:3,20 146:18 147:19 148:8 149:13,15 153:21 154:4 156:15 159:1 163:1 165:20 171:16 186:23 187:1 194:25 202:9,18 202:24 203:18 204:2,11,12,15 205:6 206:1,5,6,7 207:16,17 210:12 210:16 211:11,22	219:2 223:24 224:14,16 225:16 225:24 226:13 227:13,14 230:1,4 235:15,17,19 236:8,18,19,20,24 237:3 238:2,5 242:2 246:24 252:21 253:6,11 256:15 261:12,13 265:23,24 269:15 270:16 280:20 281:17,18 282:1 282:23,25 283:8 283:24 286:5,14 286:25 287:8,11 288:16 289:13 290:15 291:22,23 293:15 296:5 298:10 299:15 300:12 301:1 305:8,19 307:18 308:25 309:3 311:4,7 312:23 313:25 314:2 315:3,10,18,25 316:2,21 317:19 317:20 good 4:1 5:24,25 7:16 13:15,17 18:19 33:14 34:6 34:9 38:20 48:2 55:2 84:6 102:24 107:24 108:6 110:10 121:15 122:10 132:4,20 137:10 172:7 174:24 179:16 180:17,19,25 187:21 195:19 212:12 220:5 224:6 231:4 234:9 235:3 250:3 259:3 272:16 285:2 288:8 296:19 Goodrich 116:8 279:3 Gordon 2:19 46:15 64:9,10 68:15 103:8 157:23 158:15 161:12 163:25 166:3,6 187:25 188:9,11 188:16 192:25 194:5 248:8,24	292:7,17 Gordon's 161:16 gosh-darn 52:9 64:16 gospel 123:13 gotten 163:20 governed 92:16 governing 86:12 government 116:25 117:2 119:21 272:14 278:25 279:13 governmental 67:14 governs 240:14 Graham 150:21 151:12 grain 304:11 Grand 110:9 215:16 216:6 grant 17:10 granted 18:4 80:22 88:13 91:15 granting 91:9 great 105:17 112:10 112:10,11 142:18 169:12 205:21 212:4 262:8 286:2 294:5 295:8,9 greater 225:20 Grimm 162:17,20 162:24 163:3,25 164:1 ground 312:23 Groundhog 47:18 groundhog's 48:5 guaranteed 86:21 guess 40:11 73:18 74:7,11 98:16 191:25 229:23 230:10 243:18 317:24 guidance 167:3 282:21 guide 107:9 guided 281:13 guilty 297:1 gun 138:23 300:16 Gunther's 276:22 Gussack 2:17 5:6,6 72:7,11 171:11 235:5,8,13,22,24 238:4,7,8,10,13 288:3,4,9 314:17 314:19 316:9 318:18,19
---	---	---	---	--

guys 19:3 41:3 81:5 212:6 241:13	174:9,11 229:8,9 236:16 269:7 306:8	helpful 17:7 45:18 227:20	32:18 37:17,18 39:15	214:12,23 215:15 216:8 218:8 219:3
H	hard 9:22 31:22	helping 61:17	home 4:2 105:16	220:8,11,16,22
H 2:16	77:15 115:20	helps 16:3,9 57:22	311:4 314:2	221:25 222:9,15
hair 132:4	125:20 140:7	61:16 78:21	honest 34:24 193:4	226:14 227:6,12
half 133:13 276:23	200:21 203:22	Hemstock 9:10	283:23	227:15 228:8,19
279:6	258:16 263:5	10:18,18 128:11	honestly 38:5 55:6	228:20 229:24
Halket 3:8 5:19 57:5	292:10 293:16	130:15,25 135:22	208:16	230:10 231:10,15
57:9,9 59:21	310:17	136:5,15,23	honor 5:17,24 7:21	231:20 233:1
87:12,14,17 90:11	harder 185:22	142:11 145:17	13:13 16:20,23	234:11,24 235:5
Hall 203:11	harm 62:11	151:16 152:7	18:7,24 21:18,24	236:2,7 237:13,20
HAMILTON 2:14	Harry 2:5 4:18	156:9 169:18	22:6 24:10 25:12	237:24 238:4,7,11
hand 8:12 103:15	Hassett 166:7,14,17	171:21 173:22	26:3 27:10,17	238:18,23 239:11
178:21	166:23 245:19,20	226:18 244:5,5	28:21 29:22 30:11	239:16 240:8,18
handed 159:24	hat 197:22,23	257:4 277:12	32:4 33:4,24	241:7,17 242:13
handle 137:23	hate 21:17 97:9	278:15 299:4	34:22 36:12 37:15	244:25 245:6,12
204:13	317:13	Hemstock's 123:1	39:14,23 40:19,20	245:13,21,25
handled 180:8	he'll 204:16	140:16 168:23	41:7,11,20 47:21	246:3,16 247:1,16
292:2 295:4	head 11:12 81:1	278:6	48:4,23 49:3,6,25	248:14,19,24
311:23	123:2 127:2	hereinbefore 319:8	50:23 52:1 53:2	251:2,7,16 252:16
handling 194:16	138:23 310:25	HEROLD 3:6	54:18 55:3,18	253:10,19 254:12
hands 41:4 156:9	headed 80:14	herring 278:14	56:5,14,23 59:9	254:21 255:5,10
handy 118:15	heads 73:18	hey 54:19 56:24	60:15 61:1,5,22	255:11 256:25
hang 197:21,23	heads-up 73:16	241:13,24 296:16	62:22 65:1,12,14	259:17 261:11,20
happen 54:14	235:15	300:11	65:15 66:10 67:6	262:2,10 263:3,14
137:21 228:19	health 125:10	Hickok 2:17 5:5,5	68:7 69:12,15,19	263:22 264:2,13
happened 10:21	131:16,17,19,22	hide 39:10 241:25	70:20,25 71:13,21	264:20 265:23
13:2 22:5,10	hear 17:9 38:6 74:7	high 101:4	71:25 72:4,7,14	266:11 268:1
31:23 32:18 49:10	124:16 161:7	higher 274:11	74:15,17 75:1,11	269:7 270:4,17
52:24 64:6,13,17	237:5 285:23	highlight 120:13	75:16 76:7,13	271:17 275:3,5
94:23 96:22	304:17	265:4,6 268:3	77:5,18,20 78:6	276:2 277:18
104:22 113:12	heard 18:18 55:25	highlighted 76:5	78:12,19,23 81:22	278:2 279:24
114:2 127:5	59:3 181:25	90:23 169:19	81:24 92:3 93:8	280:14,18 282:7
129:12,17 137:21	213:11 219:9	196:16 198:17	97:8 99:2,9 100:5	283:5,8,12,23
138:1 139:5	224:17 232:4	266:20 268:11	101:14 102:1	284:13,19 286:9
141:14,25 156:22	235:25 236:6	highly 122:2,8,12	113:6 114:18	286:12 288:4
157:19 158:14,15	237:25 262:17	196:24 197:4	118:12,23 119:20	297:2 299:23
174:5 243:4 249:4	283:19 306:17	275:1	123:14 131:10,18	301:4 305:19
290:6,24 295:16	hearing 15:17 81:2	Hill 1:16	144:9 147:25	306:2,15,21 308:4
299:7	81:21 83:17 90:7	hills 258:4	150:6 154:2	308:17 309:14,17
happening 94:14	194:14 209:19	hire 142:21 294:24	157:15 161:5,8	309:19 311:9,15
97:6 102:22	211:18,21 263:17	295:17	162:11 163:1,21	311:25 312:13
140:24	hearings 85:13	hired 138:8	170:13,19 171:13	315:17 316:18
happens 47:19	heart 14:3 16:17	hires 156:8	177:15,19 179:9	317:1,18,20,23
54:25 120:20	heavy 165:20	hit 264:15	183:5 186:18	318:10,13,17,19
135:9 137:12,23	held 74:22	hither 60:22	188:9 190:9,16,20	Honor's 15:4 24:20
140:2 142:17	help 17:21 23:2	hoc 195:25,25	190:24 192:18	33:18 227:5 239:5
155:20 156:6	27:16 39:12 41:18	hold 77:13 204:3	195:5 196:3 202:6	275:9 282:20
157:18 255:9	57:19,21 70:24	238:13 271:15	202:23 203:5,13	honors 204:10
270:9	94:8 95:17 157:8	272:25 318:12	203:16 204:12	hope 22:9 39:3
happy 6:8 13:7,9	191:24 204:19	holding 211:18,21	205:5 206:9 207:3	40:11 102:12
65:6 115:24 161:4	228:6 238:16	270:8,11	207:9,13,21	261:2 262:8 313:9
163:24 166:20	267:13 269:15	holds 55:14,16	209:10,17 210:17	hopefully 56:15
167:3 169:13,15	helped 105:19	holiday 25:9	211:14,16 212:16	282:24
		Holley 25:6,7 29:23	212:18 213:20	hoping 39:19

horse 226:2 308:15	impacted 236:21	including 83:10	258:22 287:25	218:25 245:4
hot 165:19	impacts 298:12	181:9 214:25	293:13 294:17	247:18 249:7
hotel 131:6,9	impasse 36:7 39:3	258:7 301:18	301:15,17 302:17	253:4 254:17,20
hour 284:5	impediment 58:2	incompatible 221:9	312:2	254:23,24 260:9
hours 82:1 198:10	315:6	incomplete 168:16	informed 79:1	288:22 289:6,6,7
259:10 284:20	implicitly 90:15	inconsistent 217:10	298:20	289:12 302:16
house 147:17,20	implies 94:14	incorrect 86:13	inherited 207:24	303:14
housekeeping	import 15:23 208:9	99:12 244:8	initial 8:5,12,25	intentionally 15:15
316:12	importance 304:10	253:22	22:3 63:10	313:5
hug 314:2,5	important 81:11	incredibly 211:1	initially 161:18	interest 36:15,19
huge 313:22	101:1 102:15	indemnification	181:4 183:17,23	265:22
hundred 192:15	167:17 172:21	42:3	injury 53:20	interested 319:13
234:23 270:7	204:7 213:5 230:6	indemnity 62:21,22	innocuous 192:15	interesting 127:17
hundreds 9:25	234:2 261:20	Independence 3:6	input 54:1	130:3,9 157:1
143:6 220:1	262:6 263:13,15	independent 105:8	inquiries 260:6	289:18
hurt 95:18,19	281:7,9 284:22	173:16 175:20	inquiry 111:24	interfering 22:25
hurts 16:9	298:25	independently	197:8,9 225:2	interim 283:7
hypo 243:2,2	importantly 124:6	101:18 138:5	294:16,17	interlocutory
hypothetically	imposed 9:23	indicated 7:25 9:14	inside 9:2 11:20	104:11
243:4	171:13	12:21,25 178:3	133:10	internal 241:9
I	imposition 258:15	indication 214:24	insignificant 111:2	interposed 28:10
ID 295:8	impossible 122:9,11	indicting 208:24	173:19 175:5	interpret 167:18
idea 6:13 35:2	244:15 275:2	individual 245:16	299:2,5	interpretation
288:21 289:11	309:11	indulgent 244:23	insistence 10:19	223:22,23 259:14
identification	impound 91:11	industries 116:22	inspection 45:1	interpreted 95:23
178:13 209:21	impounded 182:8	infer 165:21 194:4,8	instance 49:22	95:24 99:6 102:7
248:6	182:11,12	inference 165:23	163:17 164:23	interpreting 216:7
identified 7:11 40:5	impounding 184:11	192:18,20,24,24	instances 25:20	216:10 223:18
183:6,9,25 218:2	impounds 182:7	193:2,6,9 194:9	276:10	interprets 70:4
226:8,12,24	impressed 21:9	194:12 263:23	institutional 292:20	interrogatories
232:16 233:11	improper 7:14	264:3	institutionalized	94:24 96:17,20
307:3	13:24 14:4,5,6	inferences 83:11	292:10	148:1 150:23
identify 30:16 46:9	16:4,16 34:2,4	192:12 254:1	instruct 34:1	156:18 166:21,25
51:21 86:1,7	90:21 230:3 250:5	268:8 279:25	instruction 79:3	176:22 192:3
107:3 161:13	improperly 15:16	influence 43:15	instructions 243:7	195:7
178:4,6 183:23,25	impropriety 250:17	inform 280:11	insulted 171:10	interrogatory
184:22 185:6	impugn 32:10	information 9:10,20	insurance 120:14	150:12,19,22
186:2,9 209:23	in-house 166:3,8,15	10:15 12:4 14:10	149:20	interrupt 119:24
212:25 239:12	188:3 216:19,25	26:15 29:2,9	integrity 102:14	192:7 230:21
247:17 253:13	217:14 219:7	57:13,18 83:11	298:12	232:7
262:25 309:9	241:18,20 245:19	85:15 94:25 95:1	intend 45:25	intervened 209:16
identifying 209:12	inadvertently 217:1	95:1,3,6 96:19	intended 164:20	intervention 23:20
210:4 223:9	253:16	97:18,20 104:3	219:18 221:15	25:9
263:22	inartful 30:18,21	110:2,18 114:4	242:21 245:10	interviewed 196:23
idiot 310:16,17,19	incentive 68:17	121:13 127:10	247:3 253:7,11,21	introduction 107:6
ignored 11:22	inclination 281:15	135:10 137:13	254:6 255:6	263:4 277:20
illuminate 78:21	285:18	140:17 141:20,21	intending 84:16	intrude 293:18
illumination 79:24	include 11:22 213:6	142:3 145:4 157:9	92:10 198:14	intrusive 83:12
illustrates 263:15	213:6 227:15	175:14 176:22	216:2 251:4	investigation 174:6
265:17 268:7	287:25	177:25,25 178:24	intends 65:20	258:3
272:7	included 14:12	182:22 196:25	255:19	invitation 202:19
image 190:8,9	16:12,14 201:5	198:19 199:17	intent 86:6 89:23	invited 112:2
immediately 267:21	274:17 276:21	217:8 243:8	103:7,8,10,12	174:13
impact 89:23	includes 113:9,11	250:13 256:13,17	111:20 115:4	invoking 44:12
	177:24	256:20 257:18	141:9 213:9	involve 67:7

involved 96:1 114:7 164:21 206:23 248:3,7,21 249:3 249:22 250:1 262:18 283:13 285:25	75:23 78:21 111:19 168:13 189:7 204:13 263:16 281:7,9 284:22 289:23 297:13 302:11 305:7 316:21	Jersey's 73:11 89:24 job 23:5 54:23 212:11 244:14 313:7 John 3:11 5:20 243:6 257:13 Johnson 7:5 8:3,3 10:12,12 15:8,8 18:13,13 90:17 115:6 142:22,22 142:25 143:25,25 169:11	67:25 110:9 215:16 216:6 224:25 313:19 314:1 jury's 50:19 59:20 justice 85:17 100:14 100:18 104:2 111:6 182:2 209:24 justifies 15:5,18 111:11 justify 12:8 64:2 JUSTIN 3:4	232:19 245:16 275:11 297:25 298:25 299:11 know 5:14 17:20 21:19 27:7,8,9,14 27:21,22 29:3,11 29:16,24 30:14,23 32:1,14,23 33:19 34:22 35:16 36:21 37:23 38:1,8 41:15 43:12,24 44:8,16 47:5 48:7 48:12,19 51:15 53:9 54:20 55:2 56:15,24 57:5 58:6,11 59:10,15 59:17 60:1 61:23 62:20 63:7,18,19 63:23 64:1 66:19 66:22 70:12 74:5 77:21 78:17 80:13 101:16 102:15,21 104:12,18 105:5 105:23 107:6,7 111:12 113:21 119:3,11,13,17 121:12,23 122:8 122:14,23 124:14 125:3,6 126:3 128:10,25 129:8 129:10,11 130:10 132:20 133:5,8 137:1 139:11,13 140:6 141:3 142:24 143:10 145:11 149:11 151:18 152:9 153:16 154:13 155:13 158:23 159:1,4,5 162:23 163:22 164:3,4,8 164:11 165:19,25 167:2 169:16 171:11 174:3,4 176:2,10 180:20 180:21 182:12,13 182:13 186:24 193:12,15,17 194:21 195:3 196:9,25 198:6 201:25 203:17 209:25 211:4,25 214:20,21 227:18 227:24,24 234:4 236:10 237:9,17
involves 84:3 iota 59:13 Iron 176:2 Ironstone 1:23 irrelevant 96:4 252:1 Island 135:16 155:21 156:1,3 257:23 isolated 293:24 issue 16:11 18:8,20 26:9,19,22 30:1 30:17 32:22 35:19 36:11 40:7 44:23 45:22 51:11,14 62:23 64:10 70:14 75:2 76:13,17,20 76:24 80:25 83:8 85:3 88:21 89:12 100:23 107:13 111:13,15,22 112:5,10,10,11,11 113:10,11 119:19 120:8 123:25 157:2,7 158:9,11 165:1,3,13 174:22 175:20 177:25 179:2 181:10 184:12 195:15 196:24 209:10 216:23 227:5 231:22 232:2 238:18 248:12,15 249:7 252:2 255:8 256:16 262:13,21 263:7 267:9 271:17 272:22 276:25 277:1 278:1 279:22,24 281:18 284:24 287:25 288:17,18 288:20 289:8 303:9 307:3 314:21 issued 91:9 267:15 issues 14:23 23:22 24:3,23 25:13 26:8 40:2,4,8 41:12 51:13 60:11	item 91:6 161:22 items 6:4,6,11,15 316:16 iteration 208:25 iterations 206:25 <hr/> J J 1:12 2:23 319:4,18 jackpot 260:4 January 42:11 45:2 85:20 87:5,10 209:18 Jared 2:6 4:14,14 12:15 157:12,15 159:8 178:15 190:8,12,15,20,24 202:11,23 203:2,4 203:8,13 204:19 266:24 300:25 301:3 317:22 318:1,10,13 Jedlowski 92:23 94:23,23 95:4,23 95:25 96:1,21,23 167:1 Jeff 25:17 Jeffrey 5:23 190:22 Jersey 1:1,24 36:16 43:22 44:15,17 46:2 48:13 50:17 53:1 57:17 65:23 66:17 67:17 69:20 69:24,25 73:4,6 73:24 74:1,20,22 75:2,21,22 76:23 82:17,18,25 89:2 91:9,23 92:14,22 93:7 94:22 95:5 97:15 102:3,4 105:12 112:23 114:22 156:19 198:15 213:17 214:21 215:5,9 216:7,10,10 218:12 220:2,21 221:5,8,19,21 222:2,7,8 281:21 306:16,22 307:14	join 288:4 joined 135:12 joins 87:8,15 joint 42:5 43:22 47:7 70:2 joked 101:6 Jones 44:3 67:4,12 68:19 Joyce 161:11 judge 26:3,21 60:12 74:21 76:2 77:3 83:9 92:18 93:1,1 104:1,16 105:1,3 105:13,14,25 106:8,10 121:14 150:15 151:4 171:16 212:14 233:5 282:2 283:12,12 295:6 302:4 307:21 317:7 judges 103:25 165:8 299:18 Judging 65:3 judgment 105:8 112:3 121:17,19 121:20 148:15,16 148:20 151:10,11 151:13 165:6 174:13 179:16 287:12 290:8 297:22 298:9 judicial 317:3 judicially 317:6 judicious 154:4 Juliet 113:21 July 142:15 jump 51:10 juncture 36:7 40:12 June 114:18 jurisdictions 53:24 53:25 jury 50:7,14,18,18	keep 9:22 132:4 141:21 170:17 178:20 265:23 293:10 302:16 keeping 168:24 keeps 5:14 Kempo 188:9 Kennedys 78:2 kept 139:16 289:13 key 212:24 219:17 220:12 239:10 265:10 271:25 277:1,8 285:8 kick 311:4 kids 212:5,7 kill 237:9 KIMBERLEE 1:3 kind 12:25 38:9 41:4 61:10 66:2 71:2 84:1 97:7 116:5 137:19 146:1 192:25 195:25 200:20 238:20 245:23 260:24 264:12 278:21 310:8,17 310:18 kindness 204:14 kinds 165:16 Kirkland 2:9 40:22 164:11,12,20 179:8,11 205:16 205:19 207:5 211:15 knew 7:2 9:7 26:10 55:22 56:8 94:25 116:14,15 127:1 145:5 155:24 165:4 171:15 194:5 207:10	

238:12,19 240:7 241:15,16 242:8 244:10 248:17 257:11,12,14 260:25 261:3,10 264:11,16 265:6 267:23 274:13 277:19 280:19 281:8 282:16 283:20,22 284:7,8 285:3 286:1,5,7 287:8 290:1 291:25 292:11 293:1,13,17 296:17 298:14,22 299:20 300:17,19 301:10,18 305:24 307:5,9 310:22 312:13 313:12 315:9,24 316:13 317:2 318:6 knowing 144:17 195:5 199:19 312:2 knowledge 42:22 149:4,5 150:5,7 155:7,11 292:20 known 14:18 26:17 116:10 knows 40:8 53:2 132:7 155:25 192:1 206:24 214:12 Kozlov 6:10 17:4 79:21 82:8,12,24 83:20,24 86:15,15 86:22 87:21 90:12 197:17,19 198:5	275:14 278:2 307:18 lap 105:18 laptop 205:12 large 32:23 79:6 211:2 244:12 251:25 255:17 largely 88:22 91:1 244:2 278:13 315:5 larger 217:21 late 15:5 53:19 153:18 197:20 245:14 248:11,22 248:25 251:10 264:16 Latta 44:3 46:20 48:17 49:7,11,15 49:16 50:2,4 51:1 51:9 53:8 58:17 60:3 law 1:11 3:6 36:16 46:17 48:16 50:17 55:13,16 57:17 58:15,19 59:12 65:24 66:11,17 67:17 69:24,25 70:4 72:15 73:6,8 73:9,10,11,13,14 73:21,24,25 74:1 74:8,12,20,22 75:2,2,2,5,14,20 75:21,23,23,25 76:23 77:8,25 92:13,13,14,15,21 92:22 94:22 97:2 97:6,15 100:24,25 101:17 102:20 103:22 107:17 109:25 110:15 112:23 113:8 161:11 193:3 196:5 210:16 213:24 214:21 216:2 218:12 221:4,5 306:22 307:14 311:15 lawsuit 135:10,13 135:19 208:5 233:19 lawsuits 53:21 54:3 lawyer 17:15 34:9 45:22,23 94:24 96:2,3 101:6 122:4 153:4 155:2	155:22 156:6 158:25 164:1 186:13 193:18 195:11 235:2 241:12,13 245:19 248:3,6 298:14 313:3 lawyer's 308:23 lawyer/client 62:2,4 lawyers 9:5 18:19 25:15 34:7 39:18 45:17 52:8,9,14 52:23,24 54:9 165:4 171:23 172:7 199:3,4,6,7 199:9 203:23 208:25 219:1 248:21 249:21 250:1,1,11 255:12 262:18 263:19 285:2,22 312:22 315:9 lay 51:16 98:8 103:8 layers 14:6 laying 57:8 lead 44:14 207:8 208:3 228:2 leading 122:6 leap 195:18 learned 39:24 59:12 161:22 163:3 learning 281:6 leave 6:19,22 14:24 17:16 18:3 88:11 88:13,20 91:10,14 91:17 229:10 leaving 6:10 led 226:25 244:6 leeway 313:2 left 72:9 87:17 88:24 156:15 162:22 168:2 171:20 172:11 174:7 288:2 293:17 lefthand 266:23 legacy 207:19 legal 27:11,12,15 35:24 82:22 86:6 86:12 90:1 93:10 101:3 130:16,20 166:15 204:13 210:9,10,15 211:11 212:19 215:20,23 216:24 217:11,13 219:19	222:10 223:1,3 239:8 240:13 241:3 247:19 249:19 251:4 254:18,20 255:12 255:18 262:19,20 291:14 legislature 56:8 221:15 legitimate 57:23 83:5 length 17:23 122:1 Lepore 2:23 5:2,2 lesson 53:7 let's 4:5 36:8 41:22 49:15 50:2 60:7 94:18 172:10 204:7 225:4,11 227:8 231:6 247:11 248:2 255:13 300:2,2 lethal 89:24 letter 5:16 6:3,12,16 17:24 19:19 20:1 20:18 21:21 22:3 25:2 29:6 34:23 41:9 45:3 58:15 58:19 87:11 115:18 147:6,15 151:3 172:20 190:10,11,22 316:12,17 letters 146:21 147:24 165:7 166:4 199:9,10 258:11 290:10 299:17 level 109:11,13 111:10 123:24 143:19 levels 10:22,24 123:24 125:3,4,9 198:20 199:5 liability 42:17 57:10 68:2,3 254:13 liable 54:14 68:1 lie 95:8 96:25 97:4,4 219:11 lies 54:6 152:13 296:11 life 185:22 259:10 269:9 285:16 light 221:17 223:18 283:18 lightning 57:10	likewise 81:15 limit 56:9 limitation 88:16 limitations 264:24 271:19 limited 18:4 23:22 26:4 86:16 88:9 91:3 108:4 197:20 211:3 Linares 26:3,21 74:22 76:2 106:10 171:17 212:15 282:2 302:4 Lincoln 82:2 line 17:22 48:8 207:2 270:14 lined 38:18 lines 28:6 264:4 link 97:5 list 6:6 19:16 50:19 159:22 184:5,6,7 201:12 202:13,18 202:20 240:9 277:22 287:2 301:1 314:11,12 316:17 listed 9:3 29:6 186:12 200:12 201:10 241:18,20 listen 39:9 236:16 284:20 290:19 listing 19:20 88:1 169:21 210:17 lists 6:3 200:19 literal 128:17 literally 207:16 220:1 litigant 97:13 313:21 litigants 89:8 97:20 110:23 111:1 124:5 146:18 151:3 175:12,23 199:10 208:6 242:18 251:13 294:18 299:15 311:22 312:3 litigate 75:19 295:15 litigated 76:20 104:14 litigating 57:20 256:3 292:16 litigation 42:6 57:11 115:3 142:16
---	---	--	--	---

189:19 199:8 216:23 242:22,24 249:2 251:12 256:12 258:24 271:23 277:3 289:7,10 293:5,8 litigations 42:6 litigator 285:14 Litner 104:16 105:14,14 little 4:10 11:15 35:14 37:8 41:11 41:23 44:18 80:6 80:14 94:20 96:1 117:24 126:10 136:2 140:1 149:7 153:18 166:12 185:19 200:2 204:21 229:11 235:9 280:17 281:24 288:16 295:11,13 307:13 311:1 313:2 Littleton 161:11 lively 318:22 living 131:4,6,8,11 131:12,14,21 LLC 1:6 2:13,14,24 3:2,4 LLP 1:14 2:9,19 local 24:6 45:4 47:1 53:25 88:9 164:1 locate 12:16 log 157:5 158:16,20 158:22 159:1 160:8,10,20,21 161:9,10,21,25 162:5 163:7,12,18 164:10 165:16 179:23 180:5 184:15 187:23 189:17,22 196:14 218:20 220:7 241:1,17 248:11 253:15 254:25 Logan 2:15 logged 253:17,18,18 logic 16:10 54:16 logical 165:23 260:24 logs 240:21 long 7:16 25:9 27:20 38:5 54:3 89:9 114:24 181:19 214:13 261:22	291:14 long-range 53:23 long-running 246:16 longer 9:12 10:8 25:10 106:16 141:21 154:15,19 162:2 202:20 302:7 look 9:9 13:3 51:19 62:12 63:11,25 69:23 72:19 77:15 93:6 94:3,16,22 95:21 96:24 97:10 97:16 102:8 107:18 110:3,9,13 113:23 114:6 117:20,24 118:6 118:19 121:5 127:18 131:25 132:3,18 143:16 143:17 145:2 146:4,24 153:4,12 157:4 165:15,16 175:23 176:4,25 177:5 178:5,22 180:3 181:7 182:5 183:7,10,13,16 184:13,21 187:23 188:1 189:8,20 191:1 192:11 195:20,23 196:13 199:16 200:1,7,12 201:2 202:14 208:10 214:6 216:13,17 220:10 220:15 221:14 241:6 247:8,21 260:17 264:7 266:13 267:11 269:18 270:5,22 273:21 278:5 282:3,17 285:22 286:25 287:4,7 295:1 296:17 297:6,22 300:4,8 300:23 302:22 305:15 308:12 looked 48:14 104:17 105:11 111:17 118:11 122:10 126:6 135:25 172:16 177:3,6 191:23 193:24 194:24,25 268:24	277:21,23 looking 29:5 41:6 61:24 70:23 92:12 104:18 125:25 140:4 172:23 182:11 201:1 202:8 243:22,23 244:20 248:18 267:21 307:7 309:19 looks 250:3 270:15 291:19 loose 269:6 Lord 39:6 loses 208:18 lost 295:17,17 297:17 298:18,19 299:22 lot 10:14,15 22:10 65:11 76:6 78:14 81:5,11 95:14 102:22 111:24 154:1,5 167:5 174:8 189:13 206:21,22 227:19 236:20 239:1 293:18 295:12 297:3 303:7 306:12 love 293:19 loves 55:23 low 111:9 125:11 269:19 270:21 lower 109:17,19 lowest 109:13 lucid 288:9 luck 116:3 luxury 58:9 lying 217:2 <hr/> M <hr/> M 2:4,5,6,17 191:8 M-A-U-T-I 86:16 magic 274:8 278:3 Magistrate 93:1 magnification 269:19 270:20 main 291:20 maintain 229:4,20 Major-Major 242:7 307:3 309:7 majority 169:9 making 55:1 63:9 97:17 107:19 110:4 121:19,20	142:8 151:10,12 151:14 154:6 171:6 183:5 202:15 230:12 236:12 259:18 298:2 malpractice 55:1 56:9,10 man 308:19 man's 121:10,11 mandatory 104:10 manner 193:4 208:5 mantel 96:7 manufacturing 126:20 maple 310:10 March 38:16 129:24 135:22 160:13,15 187:22 208:2 236:3,4,5 238:2 314:23 marginal 61:7 Marino 3:9 5:20 Mark 17:22 marked 18:5 201:19 201:25 marker 40:1 Market 1:11 2:3 marketing 255:13 255:21 271:21 277:2 married 101:6 marshal 223:20 marshaled 223:17 254:1 280:1,4 marshaling 250:19 259:10 Martin 155:21,22 156:20,23,24,25 157:2,6,10,20 158:19 189:16,18 189:18 191:3 218:21 257:25 258:1 marvel 310:23 Massachusetts 147:5 151:14 masse 85:19 massively 214:16 master 1:11,17 4:1 4:9 5:12,22,25 7:22 8:6,10,19,22 9:17 11:25 12:3,6 12:11,22 13:5,9 13:15,25 14:8,21	16:7,18,21,24 18:10,17,25 21:19 22:7,11,14 24:13 24:17 25:6,19,25 26:13,18,21 27:14 27:25 28:2,23 29:18 30:2,5,12 30:20,24 31:7,14 31:18,21 32:1,5 32:25 33:5,10 34:3,9,16 35:1,6 36:8,18 37:1,7,11 37:16,18,22,25 38:20 39:17 40:10 40:24 41:15,21 47:24 48:2,10,25 49:4,14 50:1,9,13 50:24 51:5,23 52:12,19 54:8 55:5 56:11,19 57:1,11,16 58:14 58:18 60:5,16,19 61:2,14,25 62:3 62:15 63:7 64:4 64:20,23 65:5,8 66:5,11,14 67:12 69:3,13,20 70:23 71:3,5,18,23 72:2 72:5,8 73:2 74:16 74:18 75:4,8,10 75:12,18 76:4,10 77:2,6,19 78:1,4 78:10,24 81:4,9 81:23,25 82:6 85:18 87:8,13 92:25 93:3,14,17 93:21,24 94:1,5,7 94:10,19 95:12,17 95:25 96:11 97:9 97:25 98:6,16,22 98:25 99:8,13,17 99:22,25 100:11 100:17,20 101:9 101:15,24 102:12 103:3,11,15 104:5 104:8,21,25 105:2 105:9,13,24 106:4 106:7,13,18 107:4 107:9,12,21 108:14,17,22 109:2,19,24 110:6 112:12,15 113:13 113:17,20 114:9 114:15 115:7,9,14 115:17,20 116:1,5
---	--	--	---	---

117:17,22 118:14 118:18,24 119:3,9 119:18 120:3,7 121:8,18 122:23 123:8,12,15 124:8 124:12,22,25 125:5,16,19 126:3 126:18 127:13 128:3,8,13,16 129:18,23 130:1,4 130:7,21,24 131:3 131:8,11,14,20,24 132:3 133:11,15 133:18,20,22 134:1,4,9,13,17 134:21,23 135:1,5 135:7,15 136:1,8 136:14,18,20 137:3,9,16,18,22 138:10,21,25 139:4,11,21 140:4 140:7,11 141:1,16 143:3,10 144:4,7 144:11 145:7,19 146:24 147:2,8,12 147:14,19 148:7 148:12,19,24 149:2,6,12,18,22 149:25 150:3,10 150:14,24 152:1 153:7,11,20,23 154:9,13,17,22 155:1,4,7,16 156:1,11,22 157:8 157:13,16,24 158:3,6,12 159:4 159:7,12,15,19,21 159:24 160:1,12 160:15,23 161:6 161:23 162:4,12 162:15,23 163:5 163:11,19 164:3,8 164:22 166:5,9,12 166:17 167:7,23 168:1,6,9,19 169:2,6,22 170:7 170:11,14,17,21 170:25 171:4,6,10 171:22 172:4,25 173:4 174:19 176:6 177:2,6,9 177:12,16,21 178:8,12,15,19 179:6,10,18,21,25 180:3,8,12,14,22	180:24 181:2,5,18 181:21 182:6,17 182:23 183:11,15 183:20 184:6,24 185:3,6,18,21,24 186:4,14,17,21,24 187:3,12 188:2,5 188:10,15 189:3 189:25 190:5,11 190:13,19,21,25 191:5,8,10,15,22 192:6,19,23 193:13,17 194:7 194:14,19 195:9 195:22 196:6,9 197:4 198:9 200:11,17 201:9 201:18,24 202:2,7 202:24 203:3,6,10 203:14,17 204:6,9 205:3,7,10,13,17 205:22 206:4,18 207:4,10,25 209:5 210:8,20 211:13 211:20,25 212:3 212:22 213:12,15 214:25 215:3 216:4,6 217:16,19 218:4 220:17,20 220:24 221:1,6 223:11 225:4,10 226:4,11 227:8,16 227:18 228:2,5,15 228:22,24 230:1,4 230:21 231:1,6,9 231:11,17,21 232:1,8,12 233:7 234:8,12,16,21 235:1,7,12,14 236:4,8,11,15,23 237:14,17,21 238:1,5,8,12,15 238:19 239:14,17 239:19 240:15 241:11,19,22 243:1,16 245:1 246:7,11,22 247:13 248:17 249:24 251:17 252:8,12,17 253:2 253:9,24 254:8,19 256:7,23 257:3 258:1 260:14 261:13,21,24 262:1,4,11 263:5	264:9,25 265:5,24 266:4,7,12,15,17 266:22,25 267:10 267:20 269:9,14 269:22 270:2,5,9 270:13 272:15 273:15,20 274:8 274:13 275:1,7,23 276:3 277:11,19 277:23 279:18,21 280:15 281:3,13 282:10,13,23 283:6,13,15,18 284:8,11,15,25 285:15 286:10,13 286:18,22 287:5,7 287:11,20,22 288:1,7,11,15,23 289:3,25 290:13 290:19,22 291:2 291:10,16 292:22 293:4,7,21 294:1 294:7 295:24 296:10 298:4 299:20 300:5,15 300:25 301:5 302:1 303:10,22 303:25 304:5,8 305:2,18,21,24 306:5,8,19,24 307:11,17,25 308:5,11,18,23 309:1 310:2,5,11 310:15,20 311:1,6 311:12 312:16,20 313:1,24 314:4,9 314:20 315:19,21 316:2,6,10,23 317:5,10,16,21,24 318:3,12,14,18,20 material 12:4 44:23 117:9,13,25 134:19 139:6,24 140:19 266:8 267:4,23 materiality 83:7 materials 13:23 15:20 18:12 274:18 277:2 278:10,17 math 134:11 278:12 278:16 279:15,18 Matt 5:2 matter 23:10,15 26:19 28:9,16	30:9 59:19 64:7 66:17 75:3 91:15 103:24 125:10 170:21 194:22 207:6 232:24 241:2 243:24 281:24 295:19 309:24 matters 89:21 91:21 122:7 165:25 214:16 234:5 MATTHEW 2:23 mature 71:20 Mauti 86:16,18 MDL 150:12 mean 6:1 11:25 12:22 26:2 32:8 59:7 93:17,19 112:24,25 119:24 120:3 122:9,14 127:13 128:13 129:19 132:22,23 132:23 133:2,4,7 138:10 159:19 169:12 176:6 185:19 192:14 197:2,5 211:4 215:7 224:25 241:11 260:4 264:23 265:9 266:7 280:8,10 292:17 303:8 meaning 48:15 134:23 213:2 275:2 meaningful 229:22 meaningless 192:15 means 36:1 109:15 113:1 121:24 122:13,24,25 123:2 126:4 206:6 213:4,22 214:18 214:19 215:8 218:9,17 221:13 229:5 298:7 meant 40:14 273:25 302:23 measure 7:17 32:23 Medford 1:24 mediation 20:21 mediator 283:12 medical 235:16 medication 282:4 meet 24:6 45:5 47:1 59:11 70:8 100:5	100:16 112:3 210:24 222:19 307:2 meeting 128:19,20 230:7 meets 99:10 memo 130:5,11,12 130:13,14 140:15 140:16 141:2,6,17 141:17 142:2,10 146:7 187:21,22 188:20,25 189:10 189:11 216:20,25 217:4,11,14 219:7 226:19 243:2 264:10,12,14 302:23 memorandum 130:2 memory 136:10 memos 188:2 mention 210:2 mentioned 174:2 mentioning 22:2 mercies 206:5 merely 214:4 255:20 merit 146:18 merits 15:25 38:5 91:17 281:18 mesothelioma 128:24 276:7 Messrs 19:20 23:13 met 84:21 89:1,20 223:8,10 260:1 308:7,10 meters 285:23 method 125:8 methods 289:20 Michael 2:5 4:16 166:7,13,23 Michigan 147:4 microscope 138:18 172:23 173:12 270:23 271:8 272:11 289:22 microscopes 270:21 294:4 microscopy 271:8 middle 33:13 238:20 mill 127:22 MILLER 3:2 million 121:14 134:13,14 277:14
---	---	---	--	---

millions 120:25 207:16 mind 76:11 88:16 152:10 153:23 235:21 293:10 297:1 minds 263:19 mine 7:5 10:16,17 10:20,23,24 11:5 11:11,13 90:17 101:6,8 115:6,11 126:13,14,17 127:1,2,11,12,14 129:14 138:9,12 138:13,14,16 140:20 142:25 143:15,23 169:11 186:7,7 277:8 299:9 307:21 minerals 268:14 mining 127:21 minute 203:19 231:2,7 235:11 minutes 21:25 111:13 135:21 198:10 209:11 287:19 288:14 311:8 313:16 misarticulate 223:1 miscited 178:9 misconstrue 86:12 misery 55:23 misimpression 97:13 misleading 34:5 145:15 166:13 184:19 misled 111:7 misplaced 305:25 misread 55:6 misreading 113:8 misrepresentation 110:22 181:11 184:20 misrepresentations 85:10 110:24 115:1,2,5 126:11 179:4 189:14,15 247:24 302:13 303:19 missing 86:7 157:11 167:10,11,14,16 169:1,8,10,11 174:9,17 177:14 226:25 301:24	302:2 misspeaking 168:13 misspoke 119:13 misstatement 242:23 misstatements 227:4 242:18,22 249:1,10 251:10 251:13 misstating 313:5 mistake 13:19,21 136:21 163:23 mistaken 149:16 mistaking 199:18 misuse 86:6 219:19 247:19 249:19 251:4 255:17 misused 255:12 mix 91:7 model 218:13 modification 22:15 modify 21:11 moment 66:12 87:23 99:23 117:18 230:22 235:6 moments 275:11 Monday 150:7 202:25 315:18 317:19,20 money 33:16 Montalto 2:23 5:4,4 month 39:22 210:5 months 81:5 140:3 140:14,15 263:9 monumental 273:9 274:1 moot 20:19 Morey 49:13 60:14 60:18 Morey's 44:3 50:2 51:11 60:19 67:4 67:13 morning 4:1 5:24,25 13:15,17 224:14 224:17 262:15,23 263:14,17,25 265:15 mother 32:15 34:23 motion 6:10,19,22 7:14 14:11,24 17:4,8,10 18:3 19:5 20:13 24:2 38:21 41:22,24,24 42:13 45:8,10	46:16 47:3,5 64:8 65:13 72:13 74:12 76:14,18 79:10 80:1,9,11 81:17 81:18 82:3,6,8,11 83:20 85:22 87:20 89:13 90:22 91:10 91:14,17 112:3 148:14,16,19 151:11 174:13 190:17 200:13 210:4 211:24 212:20,21 230:6 233:3 245:23 246:2,4,6,8,17,23 255:24 263:9,10 286:17,21 293:11 314:7 315:14 motions 6:5,9,14 21:7 151:10,13 165:6 192:4 286:3 290:8 303:3 motive 43:7 47:10 Mountain 176:2 mouth 308:22 move 39:21 140:9 298:19 305:15 moves 34:14 movie 47:20 moving 8:13 18:6 29:20 61:21 79:3 80:16 185:20 MSDS 116:25 118:3 118:6,13,24 119:8 119:14,23,25 249:13 MSDSs 118:11 119:10 muddle 205:3 multiple 10:24 111:10 120:18,20 163:16 175:6 198:22 267:17 294:11,11 mutually 33:5 mystery 163:20	narrow 78:17 86:19 99:14 narrower 99:11 narrowly 55:8 56:7 99:7 nation's 122:6 national 53:20 native 94:8 307:18 nature 28:7,20 29:9 29:11 31:3,9 229:7 navigate 25:12 nearly 89:7 318:2 necessarily 12:7 34:13 76:23 270:6 302:2 necessary 18:18 44:23 201:14 285:19 316:7 necessity 264:18 need 14:22 23:2,5 37:7,22 38:6 39:11 42:10 43:2 43:13 44:22 45:13 46:19,23 49:7 57:5 58:6,25 59:2 59:4,5 61:18,18 61:18 62:25 63:8 63:10,18 64:19 65:17 70:7,13 74:12 80:7 83:5 84:23 86:22 94:8 94:12 105:22 110:14 112:13 121:13 123:3 141:12 153:12,16 167:2 181:7 188:1 189:8 196:12,13 200:4 203:19 222:17 227:14 237:6,7,14 240:2 240:7,19 241:19 246:5,20 255:23 261:6,22 265:5 283:16 285:1,3 287:3,12,23 291:24 295:19 307:22 315:11 316:23 317:1,2 318:15 needed 43:18 79:7 91:19 131:22 246:19 needs 66:3 79:11 91:6 225:22	256:13 292:5 315:7 negates 89:3 negative 132:11 244:15,16 negligence 47:7 67:22 70:1 negligent 67:21 neither 21:21 319:9 319:11 net 38:4 never 52:17 53:2 78:5 81:13 111:17 119:10 124:17,20 126:12 129:16,22 164:20 174:2 178:18 183:6 188:16 191:17 192:4 209:3 233:10 242:9 256:14 289:21 297:3 301:10 303:17 304:13 new 1:1,24 2:20 36:16 43:22 44:15 44:17 46:2 47:4 48:13 50:17 53:1 57:17 65:23 66:17 67:17 69:20,24,25 73:4,6,11,24 74:1 74:20,22 75:2,21 75:22 76:22 82:17 82:18,25 88:1,2,5 88:6 89:2,24 91:9 91:23 92:14,22 93:7 94:22 95:5 97:15 102:3,4 105:12 112:22 114:22 127:22 148:8 149:21 156:19 198:15 213:17 214:21 215:5,9 216:7,10 216:10 218:12 220:2,21 221:5,8 221:19,21 222:2,7 222:8 267:16 275:21,21 280:22 281:21 283:3,3 306:16,22 307:14 314:11,12 Newark 3:3,3 203:12 newer 235:9 newly 275:17,18
---	--	--	--	--

Newman 92:18 night 17:19 203:12 Nina 2:17 5:6 nine 88:3 NJ 1:16 3:3,7,10 Nobody's 77:13 nodding 73:18 nomenclature 225:17 non 69:13 non-disclosure 26:14 non-privileged 232:17 240:18 245:22 246:25 non-settling 49:18 50:4,10 nonsense 175:8 normal 311:22 normally 19:6 112:25 128:3 281:22 notation 47:17 note 15:7 16:1 21:14 22:23 83:19 86:24 88:8,18 149:7 181:17 271:17 278:18 314:3 notebook 139:16 notes 11:3 65:9,11 138:19 139:9,16 140:24 156:13 172:22 173:1,5,9 173:11 174:6 319:7 nothing's 290:6 notice 15:6 60:9,21 66:8,19 67:15 68:9 69:8 70:19 74:3 257:9 315:3 noticed 229:11 264:20 266:19 278:21 notified 85:21 notify 70:7 noting 88:13 notion 88:16 102:3 102:19,23 174:20 206:23 289:11,15 306:25 November 7:24 8:4 10:2 14:11 15:11 82:9 207:7 number 6:21 7:12 11:6 19:7 20:3,12	28:5 39:4 46:14 46:24 82:10,10 84:24 85:20 87:5 87:10,18 106:21 120:24 121:14 127:24 128:4 141:18 143:13 163:13 176:11 185:9 186:14,19 188:25 189:17 200:20 201:19,21 207:2 210:22 211:3 220:12 225:14 239:21 258:11 263:7 269:5,5,11,12 271:13 272:7,24 274:9 277:25 281:12 285:22 312:12 313:13 numbered 239:20 numbering 20:17 numbers 118:6 184:7 240:10 267:11 numerous 115:23 152:12 166:1 198:19 NY 2:20 <hr/> O <hr/> o'clock 17:19 oak 310:10 oath 130:19 166:25 181:14 191:20 193:10 199:3 297:8,12 object 30:18 31:4 32:9 34:5 57:25 objected 32:19 90:20 objecting 16:8 22:21 objection 13:19 14:3 14:25 16:17 20:1 24:5 30:25,25 32:16 33:25 34:18 objections 16:25 19:10,16,21 20:5 23:12 38:2,25 40:14 objectively 244:10 objects 90:24 obligated 172:8 obligation 18:22	50:20 65:25 68:8 68:16,25 69:4 70:18 71:9,14,16 71:19 108:3 302:5 302:8 obligations 230:7 obliged 253:24 observed 278:2 obtained 82:22 93:11,23 111:3 obviated 286:24 obvious 89:24 228:3 obviously 13:18 15:22 178:23 192:9 211:16,23 216:16 occasionally 270:10 270:21 occasions 9:2 occur 108:2 occurred 27:19 114:21 115:7 290:23 309:23 occurring 21:15,22 163:17 Ocean 97:3 October 19:7 42:1 80:8 81:3,4 135:13 263:4 266:24 offensive 253:22 offering 312:6 offhand 317:23 office 96:18,21 176:21 181:13 242:8,9 OFFICER 319:1 offices 1:11 156:4 oh 54:13 64:12,16 72:8 101:15 129:3 136:7,10 144:23 190:5 210:2 256:16 286:15 315:19 Ohio 150:21,23 151:10 153:2 okay 5:12 6:12,16 13:11 22:7,13 28:14 30:12 31:20 32:5 36:5 37:25 38:20 41:5,15 49:14 50:24,25 54:7 56:3,7 57:9 57:23 59:2,4 61:7 61:25 62:1,8,11	64:20 71:3,5 73:2 74:16 75:10,12,14 75:18 77:2,19 94:1 99:17,25 101:24 104:25 105:9 106:4,20 107:8 108:24 109:3,24 113:17 113:20 115:9,20 117:14,15,25 119:18 120:1 123:12 124:22 125:16 126:5 128:8 131:24 132:8 133:22 135:5,9 136:18 138:24 139:4,14 140:11,13 147:2 149:12 150:10 151:9 155:1,7 158:3 159:12,15 160:1 162:15 163:11,19 166:9 168:22 170:2,4,6 170:14 172:13 180:12 181:5,21 183:15 185:18 186:17 187:12 190:19,21,25 191:15 194:19 195:12 200:18 201:10,18 202:14 203:6,17 204:2 205:3,4 206:4 209:6 211:1,8 212:9,22 215:3 221:1 223:11 225:7 227:9 232:1 234:8 236:3,11,14 238:1,8,15,19 243:1,11 250:5,14 252:12 257:4,22 261:24 263:6 266:4,12,25 267:1 269:14 275:7 283:6 286:10,15 287:20 288:8 291:2,24 292:22 295:1 300:1,18 303:8 304:20 305:3 306:10 308:19 314:6,9,20 314:24 315:22 316:4,8,11 318:14 318:18	old 39:22 171:7 omissions 52:3 omitted 177:18 once 9:3 61:11 63:10 78:7 85:2 111:3,17 129:13 150:8 156:24 161:22 one's 73:14 ones 53:5 61:3 188:6 210:21 ongoing 10:1 160:18 165:24 194:5 245:7 289:10 315:6 open 313:20 open-ended 31:9 opening 14:17 83:22 218:1 226:17 308:22 operate 97:13 operating 79:4 operation 127:21 277:8 operations 141:10 opinion 75:7 77:3 77:16 92:23 144:22 182:2 281:22 opinions 74:23 105:19,20 146:3 opportunity 15:20 91:2 100:2 102:5 153:21 227:1,10 229:5,6,21,22 230:15 232:6 240:23 281:1 283:3 297:4,15,18 301:10 305:9 opposed 14:25 148:15 153:25 261:5 opposing 214:10 opposite 11:23 144:19 308:12 opposition 7:13 12:23,24 14:20 15:13,21 21:4 45:7 46:15 64:7 85:21,24 86:25 87:7,8,13,14,19 90:23 265:1 option 138:25 139:2 229:24 230:5 303:23
---	---	---	---	--

oral 316:1	88:12 91:10	263:10	80:7	133:9,12,19,20
oranges 296:18	overall 53:24	paragraph 51:22	particularly 221:17	270:7 274:3,6,11
orchestrating	overburden 152:16	119:5 190:16	parties 18:23 23:17	percentage 59:21
206:24	overdue 89:9	264:6,7 266:21	23:20 24:21 45:17	percentages 50:20
Orden 274:20 275:6	overridden 86:5	268:11,12,20,20	59:10 75:19,24	51:3
Orden's 276:22	overruling 20:4	269:17 270:19	285:24 294:11	perfect 10:2,3
order 6:8 18:12 19:8	overwhelming	274:19 275:6	300:10 319:11	perfectly 35:3
19:13,14 20:4,8	89:22	paralegal 191:9	partner 261:3 308:1	performed 296:4
23:24 32:22 33:8	owe 282:2	193:18 194:20	308:1	performs 295:25
38:2 39:24 41:25	Owens 95:2	195:9 261:4	party 18:14,20	296:1
42:2,25 59:6		paraphrasing 212:6	35:23 36:3 55:12	period 7:16 31:19
61:18 82:9 91:9	P	parcel 61:9 290:24	65:20 67:20 68:2	32:11 87:16 116:9
91:22 96:24	P 1:17	parenthetically	68:4,10,12,21	120:1 247:4,8,21
104:10 116:22	P-R-A-T-T-E-R	86:24 105:14	83:5 85:6 106:13	247:23 248:15
121:13 132:25	4:20	parents 237:10	149:25 150:2	249:20 251:5,14
145:23 182:6,14	P.C 2:11	Park 1:15	250:1,2,4	252:23 260:23
182:23 183:24	p.m 301:5 314:13,23	parlance 113:1	pass 136:21	276:11
184:2,11 209:15	318:23	parsimonious 286:6	passed 215:9	periods 241:10
209:16 223:16	PA 1:12 2:4,16	part 10:14 12:9	passes 142:15	247:9
243:11 251:3	package 291:9	19:12 61:9 70:10	passing 181:16	permissible 56:17
258:21,25 281:23	packaged 16:13	80:7 83:4 97:7	Pasternack 2:7 4:7	permission 285:5
293:14 296:25	Paduano 160:3	98:13 107:19	4:7,11,11 185:25	permitted 95:20
308:13 309:4,10	161:11 196:18,20	110:4 127:22	205:7,9,12	107:18 298:11
309:16,21 310:7	253:15	129:23 138:22	pattern 49:21	perpetrating 248:22
317:2	page 28:6 47:17	144:19 165:20	251:20 252:2	249:22
ordered 9:17 19:12	53:17 74:24 75:8	195:11 200:25	pay 236:9 288:7	person 110:11
90:7 91:14 246:9	77:7 83:23 86:23	213:24 215:10	PC 2:2 3:9	241:18,20
ordering 20:5	87:24,25 88:15,20	220:9 227:15	PCM 271:19	personal 53:20
orderly 291:11	90:24 118:5,25	234:2 235:15	peep 55:25	146:10 155:10
ordinarily 85:13	157:13 200:23,24	238:24 246:18	pen 270:8,11	176:15 181:13
ore 7:5 127:13,15,16	209:20 229:10,14	256:12 266:8	pending 21:7 91:11	persons 52:4
128:12	233:24 244:19	267:8 268:1 272:4	140:21,25 149:21	perspective 160:17
organized 5:14	267:22 269:15	276:21 290:14,24	157:6 189:4 191:3	perspectives 313:6
original 7:23 20:17	273:12,21,23	291:8 302:16	Pennsylvania 47:20	persuaded 313:25
29:1 35:11 90:22	282:22 304:22	306:20	people 33:19 51:16	persuasive 103:18
167:10,21 168:2	318:9	parte 63:11 84:10	51:21,21 56:21	pertained 139:17
169:8,24 170:1,9	pages 8:24 9:25	85:14 86:10 90:7	58:1,1,10 63:17	Peter 2:10 4:24 6:24
178:3,6 197:16	77:15 88:3,5,10	108:2 224:8 240:4	101:2 111:16	13:14 128:10
281:15	88:12 177:10	247:14	119:11 121:19	phase 271:8 272:11
originally 135:12	197:17 228:13	PARTICIPANTS	128:23 145:10	Philadelphia 1:12
170:12 182:21	233:5 234:15,17	3:1	160:6,7 194:5	2:4,16 4:3
originate 289:12	234:19 237:12	participate 83:17	212:5 240:19	phone 5:18 39:4
originated 289:13	238:9 282:24	85:16 90:6	245:16,22 246:25	204:5 243:6
289:16	301:8 304:19	particles 270:22	251:23,24 257:9	phonetic 156:7
orphan 237:11	314:22	particular 61:7	257:10,13,14	photographs 138:18
OSHA 294:5,6	paid 34:24 50:6,11	63:16 76:23	285:20 290:16,17	phrase 216:16
Oulton 168:23,24	pain 23:9	100:19 192:14	290:23 291:13	222:13
outline 50:20	paper 14:12 76:7	223:9 240:12	292:8 294:23	picked 129:22
outrageous 245:11	146:25 153:12	241:4 274:5 275:9	296:16 298:18	pie 78:10
outright 184:20	290:1 305:25	particularized	299:22 302:14,17	piece 37:8 65:18
outside 125:24	papers 16:2,12	42:10 43:2,13	302:25	156:14 239:3
129:15,21 242:21	17:18 18:6 36:21	44:22 45:13 46:19	people's 79:12	256:12 290:1
outsider 27:2	80:17 91:25 92:1	46:23 58:25 59:2	299:16	pieces 143:21 149:8
outstanding 207:23	92:19 107:3,7	59:4 61:17,18	PEPPER 2:14	200:3 265:21
over-length 17:17	121:3 230:19	62:25 63:10 65:17	percent 132:25	Pier 44:4 50:2 51:11

60:19 67:4,13 pierce 55:12 208:13 250:7 258:25 pierced 197:6 201:3 pike 40:12 pin 310:25 Pine 2:20 place 22:1,3 126:19 142:3 156:2,4 195:6,8 252:3,4 298:12 319:7 Placitella 2:2,4,6 4:8 4:12,13,13,14,14 7:19,21,23 8:8,16 8:21 9:1,18 12:2,5 12:10,14,24 13:7 13:11 15:11,23 16:22,23 24:15,19 25:16 27:8 35:21 35:24 78:4,8 92:2 92:3 93:2,5,16,19 93:22,25 94:3,6,9 94:13,21 95:16,19 96:10,13 97:10 98:4,8,21,24 99:5 99:21 101:25 102:1,13 103:5,14 103:19 104:6,16 104:23 105:7,10 106:1,5,9,15,20 107:4,8,11,13 108:10,15,20,24 109:16,21,25 110:8 112:13 113:6,15,19,23 114:11,17,20 115:8,10,16,19,22 116:2,7 117:5,8 117:12,15 118:9 119:12,20,25 120:5,9 121:16 122:15,25 123:11 123:13,14,17 124:11,19,23 125:2,7,17,22 126:5,21 127:15 128:1,5,9,15,18 129:20,25 130:6,9 130:23 131:2,5,10 131:12,16,19,21 131:25 132:5 133:13,16,19,21 133:23 134:3,6,11 134:14,20,22,24 135:3,6,9,17	136:7,13,16,19,23 137:5,10,17,19,25 138:11,24 139:2,5 139:12,23 140:6,9 140:13 141:13,24 143:5,12 144:6,9 144:15 145:12,23 147:1,3,10,13,16 147:22 148:10,13 149:1,4,9,16 150:11,16 151:1,7 151:9 152:3 153:8 153:10,19,22 154:1,11,15,19,24 155:3,6,10,19 156:3,12,24 157:12,15,18 158:1,4,8,14 159:6,8,10,13,16 159:20,23,25 160:2,14,16 161:2 161:9,14 162:3,10 162:14,16 163:8 163:21 164:5,19 164:24 166:7,11 166:16,19 167:9 167:25 168:4,8,12 168:21 169:4,7,25 170:3,8,13,15,19 170:23 171:2,5,8 171:12 172:1,6 173:3,8 175:2 176:8 177:4,8,11 177:14,19,23 178:10,14,16,18 178:20 179:9,15 179:19,24 180:2,6 180:10,13,19,23 180:25 181:4,6,20 181:22 182:15,19 183:4,13,16,22 184:9 185:1,5,11 185:19,23 186:1,6 186:16,20,23 187:1,19 188:4,7 188:13,17 189:5 190:2,8,12,15,20 190:24 191:1,7,9 191:12,16,25 192:17,21 193:8 193:14 194:3,11 194:15,18 195:4 195:14 196:3,8,11 198:4,11 200:14 201:5,17,20 202:1	202:5,11,23 203:2 203:4,8,13,15,16 203:21 204:3,4,15 204:19,21 205:1 205:23 206:24 208:9,23 209:2,3 209:7,12,22 218:19 219:9 223:12 224:19 230:23,24 231:4 231:11,13 232:20 235:25 236:6,13 236:14,17 244:1 250:19 252:9,11 252:14,24 253:5 257:6,25 259:9 261:22,23,25 262:2,15 263:24 265:15,18,20 266:6,20,24 267:14 268:10,15 269:3,23 271:2,14 271:15 272:8,24 272:25 273:24 275:4,10 277:25 279:4 280:21 281:12 283:10 285:9,11 286:13 286:16,20,23 287:6,10,18,21,24 288:12,13,17 289:1,5 290:3,16 290:21 291:1,5,12 292:14,23 293:6,9 293:23 294:2,9 296:8 297:2 298:5 299:11,21 300:3,7 300:17 301:1,3,7 302:3 303:12,24 304:3,7,25 305:4 311:19 312:11 315:20,22 317:22 318:1,10,13 Placitella's 187:13 204:1,16 208:8 271:12 278:3 313:18 plaintiff 19:12,23 20:5,12 21:12 22:22 30:7 39:2 48:19,21 49:20 50:11,16,21 53:9 53:11 67:8 68:11 70:7 75:21 77:21 82:10 87:19 122:3	138:5 144:13 163:6 216:21 217:1 253:25 258:2,19 plaintiff's 67:22 122:4 155:22 158:17,25 159:3 160:5 257:24 plaintiffs 1:4 2:7 4:6 4:15,17,20 6:22 7:15,17 13:19 14:16 15:9,10,20 16:5 18:15 19:10 19:21 20:2 24:1,5 35:10,15,22 37:13 42:2,12,19 43:3 43:11,13,20,23 44:2,5,7 45:3 46:2 46:7,9,18,21,25 47:5 66:7 68:9,15 68:22,25 69:7 70:19 72:23 80:10 80:16 83:13,16 84:3,13,20,22 85:1,4,9,12,24 86:3,7,11 88:11 88:18,25 89:6,11 89:18 90:6,14 91:5 100:1 114:3 148:2 150:25 201:12 203:24 212:21 214:7 217:16 218:15 219:21,24 221:6,7 225:6,12 228:11 229:1 230:11 232:18 233:17 241:14 242:1,15 244:20 245:5 246:4,17,24 247:23 248:5 252:5 255:23 268:5 272:21 273:13 274:23 275:15 276:9 278:13 280:2,12 282:16 284:3,23 285:1 292:8 295:14,16 plaintiffs' 6:19 9:5 13:1 16:15 17:3 19:5 20:4 21:5 41:22 45:7,9 46:16,17 47:22 52:2 69:4,17	76:19 79:15 82:7 83:22 85:22 86:13 87:16,21 88:3,6 89:12 90:20,22 206:15 208:24 210:16 213:17 222:21 228:11 230:18 237:7 244:14 250:8 251:17 260:8,17 262:25 264:21 266:2 269:5 270:18 273:5,18 276:24 297:21 plant 133:6 play 78:5 82:3 304:6 304:9 player 61:7 playing 78:9 plays 203:11 plead 224:24 249:12 please 12:2 17:23 18:2 19:2 88:16 141:8 151:6 162:1 162:5 185:3 193:21 212:13 235:22 245:1 265:19 304:18 314:16 318:5 pleasure 81:23 plenty 174:15 PLM 294:4,4 plugging 265:25 plus 78:3 87:25 88:4 88:12 210:21 point 6:11 13:4 15:4 15:17 26:16 31:21 35:18 43:10 48:6 49:23 50:3 54:7,7 55:2 57:7 62:22 63:17 66:14 68:7 68:9 70:8 71:1,14 72:14 73:7 76:21 79:8 85:3 96:5 97:22,23 99:10 102:8 105:10 107:2 119:22 120:6 123:3,4,8,9 139:8 142:1 144:16,16 157:24 159:17 162:25 164:19 165:2 171:5,8 175:24 182:20 183:5 185:9 207:9
---	---	---	--	--

208:10 210:5,14 213:10 218:18 221:24 222:14 223:12,24 225:14 226:13,14,16 227:5 229:16,20 230:17 236:22 240:3 250:24 251:6,15 253:23 254:15 259:17 263:23 264:5,8 265:3,10 267:18 268:1 272:7 274:7 274:9 275:20 278:18 279:23 283:11 288:21 291:17 292:4,7,10 293:10 294:9 300:21 305:10 307:22 310:22 311:10 312:12 313:13,15 point-blank 293:19 point-by-point 224:15 pointed 241:7 244:4 269:17 pointedly 87:15 pointing 106:10 121:9 251:19 points 13:18 20:13 41:9,9 72:25 74:14 106:21,24 107:1 147:18 206:11 239:6,10 261:16 264:15 280:19 283:25 285:8 288:20 311:9 policies 141:23 Pollock 25:17 Poole 151:21 169:17 171:20 Poole's 154:9 pop 53:17 portion 168:5,7,15 168:16 205:25 247:14 273:2,4 277:8 position 25:14 59:16 65:22 76:16,19 80:2 81:14,16 154:10,17 200:15 216:24 217:11 230:10,11 245:6	positions 48:7 58:12 74:21 positive 132:11 158:9 244:17 positives 268:22 possession 96:19 142:8 179:3 301:18 possible 18:16 48:20 53:10 77:22 79:5 119:12 127:7 289:20 315:5 post 195:25 post-2009 160:3 posture 23:14 79:2 potential 68:20 potentially 177:18 poundage 133:24 pounds 133:9,17 134:12,18,19 277:15 278:19 279:10 power 185:9 270:21 powerful 268:24 practicable 66:12 practical 34:16 51:7 practice 100:25 101:17 251:20 252:3 practicing 171:3 Pratter 2:6 4:19,19 99:1,2,9,16 100:4 100:14,19 101:8 101:13,22 234:19 308:20,21,25 309:3 310:3,6,13 310:18,22 316:15 Pratter's 101:10 311:10 preambles 62:18 precedent 58:24 70:17 111:4 precedes 267:5 preceding 77:6 267:21 precision 309:10 prejudice 38:22 42:8 47:4 80:10 81:18 286:19 premature 46:11,18 65:23 72:24 80:3 premise 225:9 prepare 69:9 70:8 180:1 prepared 138:15	161:19 163:2 preparing 17:21 164:9 preponderance 83:10 86:4 107:23 108:5,19 109:4,14 174:23 197:10 199:21 208:12 224:4 225:21 250:9 259:3 presaging 124:9 presence 272:13 275:24 present 1:13 5:13 25:21 100:2,3 128:21 205:18 253:13 285:1,5 309:8 presentation 169:14 185:9 213:11 224:2,13 238:21 244:1 273:5 276:24 294:15 presented 30:8 89:12 244:21 250:22 presenting 12:9 185:8 205:16 presently 89:12 presents 6:25 preservation 187:25 189:11 preserve 67:1 106:11,14 171:13 171:18 174:17,21 303:11,12 preserved 139:7 141:10 preserving 76:13,25 press 19:11,21 pressing 116:3 pressure 132:17 262:11 pressured 132:13 presume 85:1 presuming 73:22 presumptively 17:17 pretty 9:21 19:3,3 25:2 38:18 92:13 97:3,15 120:7 130:17 132:1 137:23 187:14 196:8 209:12 250:18 292:21	prevail 303:5 prevailed 303:4 prevent 44:12 preview 53:16 previous 169:23 previously 76:5 pride 105:17 prima 84:7,9 85:25 89:2 90:5 92:6 104:2,17,19 105:12 107:15 108:1 110:3,18 174:16,20,22 179:4 195:24 197:11 199:23 200:6 208:11 210:18,23,23 220:9,11 222:17 223:1,10,14 225:12 226:1 228:10,21 230:13 230:18 232:15,23 234:3 239:2,8,23 240:6 243:15,17 243:18,23,24 247:2 255:4 259:2 259:19 282:8,14 298:2,3 299:23 300:21 302:9 303:1,16 305:14 306:22 307:2,23 308:7,10,14 309:15,22 primary 209:13 principal 54:10 principally 79:1 principles 73:8,10 73:12 print 318:5 prior 31:23 39:20 46:22 47:3 115:15 117:18 148:5 206:25 213:13 prism 244:21,23 privilege 20:2,15 24:24 25:13,22,24 26:23,25 27:1,4,5 28:10,18,22,25 29:17 30:22 31:1 31:5 32:10 33:14 35:12 36:2 38:25 40:14 44:13,15,17 45:15,20 46:13 47:12 55:13 56:6 62:2,4,14 79:22	82:12,16,21 83:2 83:3 84:2,10 85:5 86:5,20 87:21 90:15 93:9 99:6 112:20 157:4 158:16,20,21 159:1,22 160:8,10 160:20,21 161:9 161:10,21,25 162:5 163:7,12,18 164:10 165:16 174:25 179:12,23 180:5,17 181:3 184:15 187:23 189:17,21 196:14 197:5,5,13,25 201:3 202:17 208:14 211:5 218:20 220:7 241:1,17 248:11 250:8 253:15 254:25 259:1,25 privilege-holder 84:15 92:9 108:13 198:13 privileged 20:23 21:1 25:18 27:10 27:24 28:14,16 90:13 98:12 161:21 177:17 216:25 217:3 225:1 226:23 240:21 246:19,21 248:10 249:18 250:13 252:6 260:5 307:1,23 308:2,6,9,13 309:9 312:2 privileges 89:5 privy 85:15 probably 45:18 170:23 177:10,10 212:14 215:10 237:25 244:22 261:12 264:20 272:20 299:18 300:22 probative 43:6 44:13,21 47:11 problem 19:2 25:20 28:3 61:5 174:8 192:11,20 193:7 195:22 204:22 206:3 207:23 208:7 222:21
---	--	---	--	--

240:9 242:6,7 245:2 252:7,16,19 255:23 256:25 260:7,25 280:3 293:22 problematical 35:14 problems 132:12 262:24 268:7 procedural 16:25 23:14 79:2 92:15 92:21 206:11 209:9 210:14 procedurally 286:11 procedure 46:5 47:13 69:22 92:16 92:17 209:10 235:17 280:18,19 282:18 proceed 33:2 231:18 proceeding 185:15 313:21 proceedings 11:21 71:1 227:13 246:18 process 33:22 79:25 84:4,12 107:22 126:20 127:23 140:18,22,23 198:1,3 292:24 309:24 processed 274:5 produce 42:3 43:5 240:4 produced 7:10 15:9 15:10 18:13,15 44:25 79:20 83:15 85:18 90:3 163:8 165:3 170:9,10 172:17 187:7 217:1 219:4,6 253:19 256:5 product 84:18 89:4 117:3 126:15,16 126:16 158:21 160:10 164:15 179:13 274:4,25 276:6 277:3 295:8 production 8:3 10:1 15:8 42:15 44:10 47:15 90:12 127:12 profession 101:4 102:14 298:13 professional 296:2,5	professor 46:5 122:5 prominence 84:1 prompted 246:3 promptly 38:19 315:4 prong 86:22 pronounce 314:18 proof 47:10 77:23 85:3 89:25 108:18 108:19 109:3,3,6 109:8,14 143:22 223:3 244:13 256:19 257:1,4 258:12 264:18 267:14 301:12 302:1,2 304:14 proofs 225:20 295:8 proper 20:15 35:3 40:15 88:14 212:19 230:12 265:11 properly 14:19 38:2 197:20 227:6 296:7 proponents 214:2 proportionality 59:13 proposal 23:23 proposed 6:9 88:2 proposing 195:23 proposition 19:1 73:3 92:4 285:24 propounded 16:25 propriety 14:24 34:21 propter 195:25 prosecute 68:17 prosecuting 67:8 prospect 30:22 protection 89:4 prove 27:4 48:21 53:10 59:18 97:4 103:21,22 109:7,9 109:10 224:24 242:10 244:15,16 292:21 296:25 297:1 305:11 307:2,23 proved 7:9 256:20 proven 250:6 262:22 309:18 proverbial 300:16 proves 7:6,8 12:25 13:4 39:16 142:1	142:7 175:22 176:2,23,24 219:11 260:3 301:14,14,21,23 303:1 305:10 provide 35:24 70:18 84:24 202:13 203:25 210:16 291:10 provided 19:14,16 54:1 144:18 157:9 provides 42:25 199:25 proving 16:3 89:2 239:23 244:17 268:4 proximate 67:22 proximately 52:3 public 107:14 173:24 174:5 306:23 309:16 publicized 116:10 publicly 110:2,17 232:16 published 143:14 173:23 pull 215:4 259:11 272:6 pulling 271:16 pumpkin 231:3 punishable 20:8 Punxsutawney 47:19 purely 241:8 purge 130:5 140:15 140:16 141:2,5,17 142:10 146:7 187:20,22 188:20 188:25 189:10 226:18 264:10,12 302:23 purpose 34:25 35:1 59:10 88:15 127:19 195:15 304:21 purposefully 102:6 purposely 111:6 purposes 57:12,12 112:5 225:5 232:14,23 233:2 233:20 249:9 250:7 259:2,7 312:25 Pursuant 139:21,23 pursue 49:9 297:15	pursuing 234:1 Pursuit 78:5 put 26:9,19 33:19 40:1 58:2,5 59:21 60:5,9,21 68:9 115:23 116:21 129:15,18 132:11 138:23 142:19 146:20 147:24,25 154:1 158:15,19 160:9,20,21 161:20 162:1,4 184:9 185:17 186:20 187:3 195:1 204:17 209:19 217:12 220:10 222:18 223:2 226:16 230:11 239:1 245:18 248:15,20 249:7 255:5 256:2 256:11,14 257:18 258:8 261:6 265:7 265:18,20 267:16 273:13,14,24 279:4 283:25 296:14 317:13 puts 218:19 putting 61:12 116:6 192:16 226:2 255:20 308:14 316:20 <hr/> Q <hr/> qua 69:13 qualified 175:9 quantities 257:11 question 20:19 28:4 28:4,7,11,21 29:13,17 30:8,18 30:25 31:2,3,5,9 31:12 32:19 34:4 34:11,19 36:9 49:17 50:9 66:9 66:21 69:6 70:13 70:15 71:7,10 75:20 76:22 77:24 102:2 108:11 109:10 117:24 178:25 185:4 186:5 187:6,11,13 194:8 200:17 207:3 222:15,16 222:16 227:22,23 231:15,17 239:6	254:13,13 267:11 269:23 290:20 293:12 294:13,16 307:6 309:18,24 313:8 questioned 9:15 123:22 questions 20:6,14 20:16,21,22,24,25 24:4 29:5,8,21 30:15,16 32:9 33:23,24 34:21 36:13 65:7 124:9 129:1,2 130:10 132:14 206:14 207:14 283:9 284:5,24 285:11 285:12 293:16 quickly 140:10 306:11 quietly 165:22 Quinn 3:4 5:23,23 quintessential 121:10 quite 23:19 48:6 56:21 57:23 68:18 158:2 247:9 315:12 Quizone 156:7 quotation 117:6 118:13 quote 20:7 21:6,11 42:3 43:7,14,23 44:5 45:20 48:19 75:22 78:2 82:21 85:12 86:18 88:3 88:14 89:1,11 90:12,15 91:3 113:20 123:10 136:12 201:12 215:7 274:2 275:17 312:24 quote/unquote 226:18 quoted 108:13 278:2 quotes 273:2 quoting 215:5 <hr/> R <hr/> Railroad 69:23 raise 18:8 206:12 288:18 raised 77:1 80:16 165:13 207:3
---	--	---	--	--

277:17 279:24 287:25 raises 15:3 30:21 31:4 raising 20:13 36:12 119:22 randomly 269:18 rationale 192:9 rationales 192:8 raw 168:25 reach 35:8 36:7 80:4 80:5 83:5 287:17 reached 43:8 reaches 61:23 react 69:18 reaction 230:10 237:3 read 23:3 36:21 41:16 42:25 45:19 55:8 56:6,12,16 70:3,4 77:3 87:4 88:22 94:10 106:2 107:6 131:20 141:3 142:19 154:6 162:12,14 163:22,24 164:5 170:7 214:9 237:17 257:4 258:11 261:5 265:6 269:18 306:18 312:16,20 reading 56:17,18 147:14 299:19 301:8 306:6 ready 79:5 231:9,18 real 14:3 23:4,4 64:5 74:4 77:15 125:20 133:2,4 213:2 realize 220:5 realized 253:17 really 16:16 23:8 30:16 38:6 39:18 41:2,5,25 45:10 61:2 63:8 65:14 70:24 80:3 101:23 105:24 107:22 122:12 143:16 146:22 173:8 189:10,11 190:18 202:10 208:7 217:23 226:15 228:8 241:13 242:2 263:1 278:19 283:15	287:15 302:10 307:24 316:7 317:2 reapplication 81:18 reason 55:15 64:16 68:22 76:25 110:2 113:5 126:15 165:21 179:11 194:12 209:13 217:12 219:23 221:20 222:1 235:4 245:24 246:14 257:14 259:21 275:8 283:24 284:2 304:21 313:25 reasonable 83:11 84:13,14,20 89:19 92:9 108:12,18 109:2,5,9 110:11 192:12,18,20,23 193:2,6,8 194:9 194:12,23 195:2,4 195:19 198:12 199:22 208:12 224:5,5 227:10 250:10 253:25 263:19,23 264:3 268:8 279:25 287:15 reasons 11:7 57:14 64:18 209:13 224:12 233:12 239:18 rebuttal 88:4 recall 147:14 157:9 172:12 recalled 173:14 receive 84:1 150:8 received 18:14 23:16 119:21 317:16 recitals 62:19 recited 96:3 recognize 42:19 recognized 26:3 275:17,18 278:7 recollect 173:15 recollection 173:9 173:17 recommendation 105:3 recommendations 26:6,11 54:2 recommended	53:22 reconsideration 19:5 20:13 21:5 24:3,6 35:5 38:22 45:11,12 47:3 80:12 81:19 reconstruct 112:9 reconstructed 111:16 record 4:6 6:20,23 7:7,14 14:6,14,16 14:25 16:8 17:11 17:11 28:3 34:24 35:25 37:12 41:11 41:12 43:15 45:19 63:5 76:25 85:17 86:14 88:8 90:8 91:11,20 104:3 107:14 111:16 136:9 147:18 152:18 154:2 181:24 182:7,8,20 183:17,18,21 184:1 187:4,9 200:15 209:18,19 210:8,9 223:14 229:3 231:7,20 245:22 247:1 252:25 265:11 296:14 records 105:11 263:18 291:23 recount 270:20 recounted 130:12 272:5 recourse 68:3 recovers 50:22 recreate 172:16 red 134:10 172:19 241:1 278:13 redacted 211:7 redeemed 22:11 redoing 58:10 refer 136:11 266:3 reference 119:7 references 8:14 157:5 165:17 referencing 144:1,4 referred 43:19 93:8 136:4 185:7 270:17 referring 11:20 47:18 52:10 143:11 210:3 refers 41:25	reflect 218:25 247:18 reflection 30:16 reflects 29:24 refusing 287:4 regard 36:22 regarding 24:24 40:8 42:15 196:19 268:13 311:20 regardless 91:24 97:21 99:14 100:11 regular 112:25 Reiley 1:17 5:13 206:6 211:6 318:4 REINDEL 2:19 reinstated 149:3 rejected 215:22 relate 186:9 188:19 related 42:5 129:21 158:22 159:2 161:18 162:7,17 185:7 187:20 189:17 214:4,15 215:22 217:14,15 217:17 218:18,22 219:3 276:8 relates 12:20 26:4 198:5 232:4 263:16 271:7 relationship 27:12 35:17 relative 319:10,12 relatively 269:19 relaxed 215:22 released 89:17 164:14 200:10 releases 44:6 relevance 83:7 134:10 197:7 relevant 12:4 45:21 103:4,5 167:24,25 177:25 178:24 179:2 181:10 196:24 197:4 233:12 240:3 241:3 251:5 reliable 90:16 132:9 132:10 271:19 295:21 reliance 64:6 relied 46:3,21 relief 72:20 183:2 relishes 102:16,17 rely 132:9 145:8	198:4 204:2 274:23 remained 24:3 remaining 167:22 remanded 91:16 remedies 228:8 remedy 182:16 remember 46:4 75:5 118:12 157:17 233:5 263:3 remind 17:15,22 18:19 21:2 114:15 reminds 12:15 rendered 105:2 158:23 159:2 162:7,17 renders 221:8 repeat 23:1 76:3 89:18 repeated 29:22 repeatedly 215:20 216:1 rephrase 289:1,5 rephrased 32:19 replicating 207:18 reply 7:17 8:6,8 12:16,21 13:23 14:4,25 15:19 16:15 46:25 87:19 87:24,24 88:9,17 88:25 90:20,21 91:1,18 182:24 197:17 218:6 228:12 229:6,22 230:3 233:10 286:14 report 105:3,24 157:20,22 158:11 158:18 159:3,9,11 160:4 161:19 163:2,22,23 164:6 164:7,14 165:11 165:13,22 174:4 231:12 258:3,7 264:22 272:5 274:19 275:6 296:19 reported 215:11 268:23 271:1,5 275:21,24 Reporter 1:12 319:5 Reporters 1:22 reporting 276:15 reports 123:9 167:11,13,13,16
--	---	--	---	---

167:18 173:23 175:10 271:9 274:17 296:17,22 represent 148:21,22 243:9 248:8 representation 8:23 121:21 142:2 148:14 151:11,12 151:14 152:21,23 153:1 154:6 176:16 303:4 representations 11:9 85:7 120:10 124:4,13,19 142:9 151:2 155:14,14 175:24 176:3 199:19 244:7,11 290:11 representative 19:11,22 20:5 22:22 25:5,15 27:21 30:7 35:10 35:22 37:13 39:2 148:2 150:25 151:20 154:7,8,12 155:5 167:21 176:17 represented 131:7 176:9 177:23 representing 35:15 77:12 101:11 151:4 171:23 207:5 reputable 272:17 request 45:9,11 46:17 47:15 65:22 78:17 80:3 112:18 139:13 235:3 296:11 316:1 requested 21:11 72:20 require 69:16 89:25 required 19:8 43:4 45:25 46:17 47:12 73:23 103:21,22 215:18 223:15 requirement 46:9 47:1 69:16 308:9 requirements 45:4 223:4 239:8 260:1 requires 47:14 310:17 requisite 254:17,20 res 97:8 reschedule 22:18	rescheduling 22:21 researcher 127:3 reserving 72:15 resolve 41:5 resolved 32:22 104:24 238:18 263:11 281:25 respect 17:1 19:22 24:24 26:13,25 27:3,6 33:23 35:17 38:7 39:1 45:5 56:5,12 60:10 63:12 65:13 65:18 74:24 77:12 79:24,25 81:6 102:25 136:2 157:10 201:4 213:16 230:9 239:25 277:13 314:25 respectfully 294:23 respond 13:12 23:4 54:3 153:21 221:2 224:10,14 227:2 227:10 228:14,20 229:6,10,19 240:23 242:13 244:24 259:8 286:21 301:10 315:24 316:3 responded 22:1 226:21 239:2 246:5 responding 13:8 23:12 233:9 response 13:18 18:21 21:11 22:16 24:1 53:17 56:1 72:12 105:22 187:13 206:14 212:8 239:6 265:1 276:10 287:4 responses 68:23 150:12 230:20 responsibilities 298:17 responsibility 304:25 305:4 responsible 52:5 55:24,24 responsive 47:14 161:13 rest 106:23 result 38:4 155:18 237:7 255:19	299:19,21 results 10:15 104:14 121:21 125:14,14 128:19 169:10 206:7 246:1 271:19 272:3,4 273:24 275:21 293:25 297:21 resurface 193:16 resurfaced 158:19 resurfaces 157:3 retain 141:9 302:5 retains 258:2 retake 36:6 retention 130:2 141:17,22 264:14 retired 105:1 retrieve 193:21 return 140:17 257:17 reveal 110:11 revealed 29:9 191:17 revealing 29:14 30:22 review 19:8 46:22 78:19 84:21 86:9 88:2 90:2,10 91:13 110:11 153:17 191:3,13 195:16 197:3 201:11,13,22 218:21 224:8 225:23,25 244:9 245:13 282:1 283:3 311:16 312:4 reviewed 209:16 reviewing 242:14 reviews 211:5 revisit 51:11 rhetoric 208:16 rhetorical 206:19 313:2 Rhode 135:16 155:21 156:1,3 257:23 rid 299:1 303:15 right 26:18,20 28:1 34:8,15 35:4 40:22 43:11,24 44:8 48:7,11 50:22 51:5,15 53:5 55:21 56:20 56:21 57:18 58:20	59:15,17 60:25 61:12 63:14,22 64:13 66:23 67:1 71:12 72:15 76:1 80:20 86:21 94:9 95:13 103:14 106:9,15 108:10 108:14 113:16,19 114:10 120:8,9 122:15,19 128:19 130:2 134:6,14 135:8 136:16 137:10,25 138:13 139:6,7 145:21 146:4 147:16 152:2 153:10,19 155:10 158:1,5 160:2,9 161:23 163:19 168:8 173:17 176:5 177:4 178:10,12 187:1 189:5 190:5 190:12 194:6,8 195:14 199:4 201:24 202:9 205:17,19,20 209:2,6,7 212:3 221:11 227:18 231:2 237:18 244:23 256:22 262:4 267:1 269:10 270:12 273:17 282:5 284:15 286:8,22 287:10 293:9,18 293:23 294:2,14 294:23 295:14,17 295:17,18 296:3 297:9,10 298:19 298:24 300:12,16 303:24 304:7 309:14 313:14 315:20 317:11 righthand 190:7 rights 55:12 298:19 299:22 ripe 71:20 197:3 ripen 108:4 ripeness 74:10 rise 112:7 risk 31:5 33:9 60:24 61:4 66:16 182:9 182:11 233:24,25 275:17,18 308:21 308:24,25 309:3	risks 29:13 RIVERA-SOTO 1:16 road 1:23 33:4 49:8 307:16 316:22 Robert 1:12 2:6,17 4:19 5:5 319:4,18 ROBERTO 1:16 Robertson 295:1,2,2 ROBINSON 3:2 rock 10:22,25 120:16 212:1 rocks 111:16 rodeo 285:3 rods 57:10 rogue 54:19 55:21 102:20 role 96:7 271:22 292:25 293:2 rolled 270:24 Romeo 113:21 Ronald 2:12 5:1 Ronny 215:4 roof 316:20 room 4:10 17:15 18:20 26:24 68:25 80:24 101:2,19 187:17 285:23 298:14,14,15 313:4,10 root 115:4 296:11 rose 113:21 Rosenblit 233:13 Rosenthal 2:21 5:10 5:10 Roth 2:2,5 4:8,12,18 4:18 19:19 21:9 21:17,24 22:8,12 22:13,15,17 23:12 23:14,17,22 24:8 24:10,20 25:7,17 25:23 26:1,16,20 27:3,8,17 28:1,19 29:4,20 30:4,11 30:13,21 31:2,12 31:16,20,24 32:3 32:6 33:3,7,12 34:8,15,17 35:4 35:21,25 36:11,20 36:24 37:2,10,15 37:17,19,24 38:16 39:14 40:18,21 41:10,20 128:6 206:1 231:10,14 231:19,24 232:2
---	--	---	---	--

232:10,14 233:9 236:10 284:13,16 284:18 300:3 305:19,23 306:1,2 306:6,10,20,25 307:13,20 308:3,8 308:16 316:15 317:2,7,18 Roth's 20:17 Rothenberg 295:5 Rothenberg's 190:23 Rothschild 25:17 route 81:12 260:5 routine 212:4 rude 59:7 120:4 Rudy 69:21 rule 23:23 24:7 45:4 46:2,6 47:1,13 48:13,15,16,16,18 53:8 55:7 74:20 82:18 90:9 95:22 95:23 174:12 199:24,25 229:22 298:12 ruled 65:16 171:17 302:4 rules 33:1,4 38:10 65:23 88:9 95:5 200:9 218:13 229:8 312:23 ruling 18:9 21:12 305:16 rulings 311:17 run 33:9 39:9 60:23 63:23 66:16 182:9 182:10 233:24,25 261:17 running 9:21 61:4 285:23 runs 304:11	140:24 274:3 276:15,19 277:7 sampling 143:18 Samson 85:17 90:3 90:8 91:13,21 142:11 183:22 184:1 185:15 209:14,15,16 210:3,3 246:1 269:13 sanctioned 294:5,6 sanctions 147:7 258:15 sandbagged 228:12 sandbagging 228:16 228:17 sat 105:1 199:6 292:15 satisfaction 83:9 satisfied 63:14 86:22 109:22 110:1,7 satisfies 99:8 satisfy 45:4 55:11 68:5 86:3 100:13 109:8 110:18 111:9 210:18,22 223:14 224:23 239:8 241:3 243:23 303:16 satisfying 45:11 210:23 Saturday 21:10 22:23 saw 129:16,22 172:20 224:13 239:7 240:25 245:18 253:15 262:14,23 263:14 saying 7:2 22:2,18 43:14 45:3 46:25 52:13,17 54:6,12 55:9,20 56:1 59:1 59:5 67:21 81:13 83:13 90:4 94:11 95:14,20 96:6 98:10,14 99:4,11 99:12,14 100:4 110:15 119:20 121:17 124:13 146:13 147:18 150:12 160:5 165:6,7,11 166:10 166:14 172:24 177:20 181:6	182:4,25 183:23 192:3 195:19,20 196:4,4 199:10 212:6 221:14 226:22 227:25 234:1 237:5 241:24 243:4,5,6 251:20,22 254:19 260:20 276:4,6 277:5 279:11,13 284:8,20 290:8 294:21 300:20 303:2 305:5,8 310:3,13 311:25 says 10:18 17:13 21:22 36:25 37:1 37:2 42:25 57:17 60:3 66:11 67:5 73:8 75:19 77:4,9 77:25 85:24 86:18 86:25 87:15 91:4 93:14 96:23 97:12 108:16 110:8,9 117:22 129:8 136:24 137:6 141:8,14 142:23 146:3 152:5 155:17 156:19 157:12 162:6 170:8 177:17 182:8 189:18 190:6 191:23 193:24 194:24 195:10 216:20 217:2,5 218:19 243:13 258:4 261:10 274:2 298:22 scene 249:5 schedule 9:22 21:12 22:16 scheduled 315:3 scheme 258:20 260:18 Schlesinger 46:5 69:21 school 59:12 Schwartz 92:18 93:1 135:20 140:21 142:14 189:4 190:22 science 122:16 135:4 263:8,9,13 263:15 283:10,11 283:14 284:2	285:10 286:17,17 289:19 295:20 296:12,13 scienter 47:10 251:24 292:2,11 296:23 scientific 116:20 123:4 138:2,17 167:15,17 285:8 294:6,10 scientist 7:1 11:12 122:11 123:2,17 155:9 168:24 scientists 11:23 123:21 137:7 144:18 145:1 175:7,8 186:12 198:23 199:3 270:20 294:11 297:7,9,24 299:12 scope 79:10 score 15:7 screen 117:11 239:1 245:18 269:16 273:24 screw 241:13 screwed 54:12,13 seal 146:1 sealing 91:22 Sean 205:1 search 100:14,18 291:23 searches 195:10 second 7:4 9:6 20:19 44:10 45:14 65:18 75:13 79:24 83:6 119:4 126:12 169:21 209:9 225:21 257:23 266:20 268:11 269:15 271:15 272:25 273:12,21 273:23 276:23 279:6,16 282:15 305:22 secondly 210:24 239:24 secreted 111:20 112:7 302:20 section 45:19 48:14 62:1,6 187:15 secure 111:4 116:23 secured 83:12 see 16:4 31:7 34:20 35:1 47:24 54:24	54:25 55:11 62:17 64:9,19 72:10 73:17 76:4 78:19 91:25,25 106:2 132:1 143:18 146:22 162:20 169:20 173:23 184:15 187:21 189:10 195:2,16 200:15 216:1,16 216:17 222:25 224:16 243:12 261:20 266:19 268:10 270:21 272:21 274:22 278:24 281:8 300:2 307:8 seeing 64:16 118:13 157:9 173:11 187:17 seek 42:14 43:9 44:8 47:6 48:20 53:10 58:4 60:9,24 66:6 66:18 67:1 69:10 70:6,17 77:23 237:10 282:1 seeking 27:11 35:4 42:2 44:1 49:1 67:3 210:25 222:22 seen 6:2 10:2 12:17 69:17 119:7 187:10 226:9 237:19 239:1 256:15 261:1,2 274:2 280:4 313:16 318:8 sees 217:1 segues 5:16 sell 116:12 SEM 294:4 send 41:16 281:23 286:24 287:8 290:10 314:16 sends 39:7 194:20 sense 35:7 55:17 102:15 235:10 282:19 sent 19:20 21:3 22:15,17,20 23:13 23:21 127:7 130:14,18 133:12 140:15 142:10 146:21 147:6 166:4 198:21
--	--	--	--	---

267:24 316:17 317:25 318:4 sentence 141:7 273:23 275:16 sentiment 280:25 separate 8:14 9:2 43:21 82:24 101:12 126:6 174:10 225:1 238:6,7 243:16 303:3 separately 174:11 September 81:2 sequential 118:7 119:2 267:12 series 49:23 serve 27:1 served 53:19 79:13 serves 37:5 136:10 services 82:22 86:6 90:1 93:11 158:22 159:2 162:7,17 219:19 247:19 249:20 251:5 255:12,18 serving 85:18 93:3 set 52:22 60:1 111:10 150:22 218:12 224:17 227:6 240:10 319:8 Seton 203:11 sets 83:1 258:16 setting 19:6 60:6 262:9 settle 32:15 49:9 57:3,4,9 58:5 59:6 59:20 61:16,17 264:8 settled 29:1 49:20 50:15 156:25 157:19 160:19 165:22 257:16 258:5 settlement 42:4,16 43:8 44:6,11,20 44:24 47:9 50:5 51:14 57:12,19,22 57:22 58:21,24 61:19 63:1,5 64:14 65:7,15 78:18 137:13 138:23 157:21 188:20,24,24 189:9	settlements 43:14 46:7,8 settles 137:8 140:14 142:14 settling 49:19,19 50:6,11 67:10 68:13 seven 39:21,22 81:4 89:21 90:10 215:2 seventh 58:9 severely 197:20 shame 270:3 shape 72:19 270:1 shaped 268:23 shed 96:6 sheet 67:25 117:1,9 117:13,25 118:3,3 119:7,11,14,15,21 120:1 266:6,8,9 267:1,4,5,15,23 268:7,12 269:16 271:2,6 289:18 290:4 sheets 117:1 267:18 shelf 258:8 shelve 258:21 shielded 83:6 ship 75:1 shocked 311:12 short 17:24 33:5 82:3 107:5 204:7 288:11 291:8 315:3 short-circuit 12:1 short-term 53:23 54:4 shorten 65:4 shorter 18:1 287:22 shorthand 79:18 shortly 81:10 shot 186:15 show 57:16 96:14 103:1,9 123:19 142:5 145:16 165:15 166:2 190:3 222:10 233:16 241:3 255:11 259:1 264:6 267:15 269:7 271:12,18 285:9 295:13 301:22 303:14 306:15 307:1 312:1 showed 136:24	144:25 151:25 152:2,4 188:21,23 199:8 205:25 258:22 263:24 264:4 265:15 266:6 272:5,8 275:10 285:9 showing 22:9 42:9 43:1 45:13 46:19 46:23 58:25 63:10 83:7 84:7,9 90:5 108:1,5 117:7 135:23 155:16 161:10 194:3 223:15 224:3,21 228:11 234:3 240:11 248:13,14 259:16,18,19 271:24 272:1 287:1 shown 55:13 83:9 86:2 186:22 189:20 280:5 shows 7:4 140:19 224:20 249:11,14 272:3 301:25 shy 14:13 39:11 side 34:10 47:23 63:18 64:23 70:12 74:6 99:3 138:14 155:8 163:5 205:19 208:24 209:1 239:4 270:24 293:17 signed 294:21 299:8 significance 135:20 significant 10:13 11:6,14 107:2 115:2 120:23 126:10 140:2 143:2,8,21 158:10 211:24 213:10 217:13 271:22 291:15 295:2 299:1 Significantly 135:13 135:18 similar 38:13 42:6 44:6 92:20 150:20 293:7 simple 70:24 134:4 200:17 231:21 simply 22:18 81:14 85:18 90:8 112:23 141:20 163:10	224:23 229:25 259:22 sine 69:13 single 86:7 98:1,2 98:18 194:4 202:1 218:8 243:15 253:15 sir 64:22 76:2 314:19 sit 36:5 51:16 52:11 57:25 59:23 305:13 310:23 sitting 33:7 59:1 63:3 69:21 199:4 257:21 situation 67:7 228:9 six 6:6 40:5,15 90:8 106:24 150:25 214:23 301:16 size 318:7 sized 24:20 skip 23:9 49:12 166:1 slash 6:10 17:4 82:8 sleeves 71:11 slice 78:10 125:17 slices 280:21 slicing 125:20 slide 115:15 116:21 117:6 127:24 128:2 167:5 169:21,23 170:8 186:20,21 204:17 215:1,5,16 216:9 216:13 218:19 220:15 265:19 266:19 268:11 271:11 272:23 273:1,14 275:4,9 277:22 278:3 slides 204:16,18 205:11,24 206:2 209:11 214:23 215:2 220:9 224:15 240:25 261:19 262:14 265:14 279:5 281:11 283:3,4 284:1 285:9 286:23,25 287:4,8 315:18,25 slightly 67:7 Sloane 59:22 90:11 166:5,13 188:3 292:15	Slow 257:3 small 105:16 156:1 156:3 205:25 smart 228:5 smarter 184:8 smoke 313:8 smoking 300:16 Sneha 2:22 5:3 sold 133:6 134:2 solely 18:4 108:4 302:12 solidly 292:21 solved 206:3 somebody 17:16 26:24 49:8 62:9 73:7 116:13 126:14 149:9 158:12 171:22 176:1 191:19,21 192:1,2 243:5 249:11,14 278:21 281:25 292:5 somebody's 35:17 181:16 259:24 someplace 73:9 somewhat 208:19 224:16 son 136:21 300:25 soon 18:16 73:16 79:5 115:5 203:1 203:5 sooner 12:17 sophisticated 11:3 116:19 127:6,10 289:20 sorry 5:17 8:19 20:9 23:8 37:7 54:6 72:8,9 90:10 95:12 98:25 99:20 99:24 101:24 117:23 133:15 156:9 169:21 170:4,6 171:5 176:16 185:5 192:7 233:24,25 234:16 244:5 275:5 286:15 288:1,12 292:17 296:9 306:1,5 308:3,20 314:10 sort 264:9 307:3 313:7 sorts 239:20 241:10 274:22 280:11 sought 7:7 75:25
---	---	--	---	---

82:22 83:6 88:20 93:11,23 215:19 sound 94:2 109:1 sounds 208:19 source 83:12 Southern 3:10 Spahr 1:11,14 spanning 245:13 speak 4:10 7:19 28:11 29:15 31:6 47:23 64:24 149:13 160:25 203:3,18 206:7 262:14 286:14 316:21 speaking 24:8 34:18 47:22 262:17 264:22 special 1:10,17 4:1,9 5:12,22,25 7:22 8:6,10,19,22 9:17 11:25 12:3,6,11 12:22 13:5,9,15 13:25 14:8,21 16:7,18,21,24 18:10,17,25 21:19 22:7,11,14 24:13 24:17 25:6,19,25 26:13,18,21 27:14 27:25 28:2,23 29:18 30:2,5,12 30:20,24 31:7,14 31:18,21 32:1,5 32:25 33:5,10 34:3,9,16 35:1,6 36:8,18 37:1,7,11 37:16,18,22,25 38:20 39:17 40:10 40:24 41:15,21 47:18,24 48:2,10 48:25 49:4,14 50:1,9,13,24 51:5 51:23 52:12,19 54:8 55:5 56:11 56:19 57:1,11,16 58:14,18 60:5,16 60:19 61:2,14,25 62:3,15 63:7 64:4 64:20,23 65:5,8 66:5,11,14 67:12 69:3,13,20 70:23 71:3,5,18,23 72:2 72:5,8 73:2 74:16 74:18 75:4,8,10 75:12,18 76:4,10	77:2,6,19 78:1,4 78:10,24 81:4,9 81:23,25 82:6 85:18 87:7,13 92:25 93:3,14,17 93:21,24 94:1,5,7 94:10,19 95:12,17 95:25 96:11 97:9 97:25 98:6,16,22 98:25 99:8,13,17 99:22,25 100:11 100:17,20,21,23 101:9,15,24 102:12 103:3,11 103:15 104:5,8,21 104:25 105:1,9,13 105:24 106:4,7,13 106:18 107:4,9,12 107:21 108:14,17 108:22 109:2,19 109:24 110:6 112:12,15 113:13 113:17,20 114:9 114:15 115:7,9,14 115:17,20 116:1,5 117:17,22 118:14 118:18,24 119:3,9 119:18 120:3,7 121:8,18 122:23 123:8,12,15 124:8 124:12,22,25 125:5,16,19 126:3 126:18 127:13 128:3,8,13,16 129:18,23 130:1,4 130:7,21,24 131:3 131:8,11,14,20,24 132:3 133:11,15 133:18,20,22 134:1,4,9,13,17 134:21,23 135:1,5 135:7,15 136:1,8 136:14,18,20 137:3,9,16,18,22 138:10,21,25 139:4,11,21 140:4 140:7,11 141:1,16 143:3,10 144:4,7 144:11 145:7,19 146:24 147:2,8,12 147:14,19 148:7 148:12,19,24 149:2,6,12,18,22 149:25 150:3,10 150:14,24 152:1	153:7,11,20,23 154:9,13,17,22 155:1,4,7,16 156:1,11,22 157:8 157:13,16,24 158:3,6,12 159:4 159:7,12,15,19,21 159:24 160:1,12 160:15,23 161:6 161:23 162:4,12 162:15,23 163:5 163:11,19 164:3,8 164:22 166:5,9,12 166:17 167:7,23 168:1,6,9,19 169:2,6,22 170:7 170:11,14,17,21 170:25 171:4,6,10 171:22 172:4,25 173:4 174:19 176:6 177:2,6,9 177:12,16,21 178:8,12,15,19 179:6,10,18,21,25 180:3,8,12,14,22 180:24 181:2,5,18 181:21 182:6,17 182:23 183:11,15 183:20 184:6,24 185:3,6,18,21,24 186:4,14,17,21,24 187:3,12 188:2,5 188:10,15 189:3 189:25 190:5,11 190:13,19,21,25 191:5,8,10,15,22 192:6,19,23 193:13,17 194:7 194:14,19 195:9 195:22 196:6,9 197:4 198:9 200:11,17 201:9 201:18,24 202:2,7 202:24 203:3,6,10 203:14,17 204:6,9 205:3,7,10,13,17 205:22 206:4,18 207:4,10,25 209:5 210:8,20 211:13 211:20,25 212:3 212:22 213:12,15 214:25 215:3 216:4,6 217:16,19 218:4 220:17,20 220:24 221:1,6	223:11 225:4,10 226:4,11 227:8,16 227:18 228:2,5,15 228:22,24 230:1,4 230:21 231:1,6,9 231:11,17,21 232:1,8,12 233:7 234:8,12,16,21 235:1,7,12,14 236:4,8,11,15,23 237:14,17,21 238:1,5,8,12,15 238:19 239:14,17 239:19 240:15 241:11,19,22 243:1,16 245:1 246:7,11,22 247:13 248:17 249:24 251:17 252:8,12,17 253:2 253:9,24 254:8,19 256:7,23 257:3 258:1 260:14 261:13,21,24 262:1,4,11 263:5 264:9,25 265:5,24 266:4,7,12,15,17 266:22,25 267:10 267:20 269:9,14 269:22 270:2,5,9 270:13 272:15 273:15,20 274:8 274:13 275:1,7,23 276:3 277:11,19 277:23 279:18,21 280:15 281:3,13 282:10,13,23 283:6,12,15,18 284:8,11,15,25 285:15 286:10,13 286:18,22 287:5,7 287:11,20,22 288:1,7,11,15,23 289:3,25 290:13 290:19,22 291:2 291:10,16 292:22 293:4,7,21 294:1 294:7 295:24 296:10 298:4 299:20 300:5,15 300:25 301:5 302:1 303:10,22 303:25 304:5,8 305:2,18,21,24 306:5,8,19,24	307:11,17,25 308:5,11,18,23 309:1 310:2,5,11 310:15,17,18,20 311:1,6,12 312:16 312:20 313:1,24 314:4,9,20 315:19 315:21 316:2,6,10 316:23 317:5,10 317:16,21,24 318:3,12,14,18,20 specific 53:25 83:18 89:16 90:2 239:12 specifically 19:14 42:8 43:20 45:19 86:18 90:24 92:22 219:15 speculation 260:13 speed 269:7 speeded 269:10 spend 11:7 111:24 167:2 174:10 198:6 281:16 284:4 300:24 301:7 307:10 spent 30:13 111:12 207:16 259:9 286:2 299:18 spoliated 113:14 114:3 spoliation 13:2 16:4 85:2,4 86:9 88:6 88:21 90:25 111:22 112:24 113:1,2,10,18 157:14 167:4 226:14,24 227:5 227:10 229:2,4,15 229:18,20 231:16 231:22 232:21 233:1,3,21 234:1 239:3 280:20 281:2,4 302:2 303:5,6,8,18 304:1 314:21 sporadic 124:3 sprawling 245:15 Spray 97:3 spry 132:1 squabble 9:4 Square 2:3,15 squarely 70:9 stack 318:7 stage 72:18 76:18 89:16 100:9
--	--	---	---	--

225:22 282:8 315:15 stand 294:8 314:10 standard 19:3 24:6 84:14,21 86:4 87:2 91:5 92:8 93:6 98:23 99:4 99:10 100:5,6,9 100:12,16 101:4 103:20 153:14,15 210:15 212:22 213:2,4,23 214:1 214:8,11 215:22 216:18 217:13 218:1,3 219:3,5 219:23,25 220:2 221:10 222:5 223:6,7,10,13 240:13 241:3 299:24 306:16 309:12,16 standards 45:12 86:12 210:10,10 211:11 212:20 214:2,15 223:2 296:2,5 306:12 standstill 42:4 start 6:18 15:24 19:6 41:23 71:6 73:3 90:3,5 92:4 115:3 120:23 207:5,15 247:11 267:13 started 79:25 115:5 141:22 198:12 251:21,25 273:5 starting 4:6 20:10 49:23 50:3 53:19 63:17 starts 75:15 142:16 state 42:21 46:16 53:18 84:20 85:16 86:16 87:1,4 91:20 147:4 152:20,21,22 156:19 182:25 222:3,17,25 stated 177:1 215:20 statement 98:10,19 123:19 151:23 152:8 183:5 208:15 249:22 268:16 269:1 276:13,13 statements 13:1	86:14 152:19 206:20 244:4 249:15 255:13,21 263:20 265:12 271:21,22 277:2,9 280:11 299:17 states 1:1 48:18 73:13 82:20 150:18 155:15 218:14 272:14,18 stating 297:19 status 90:25 149:2 149:22 statute 44:15,17 45:16 56:4,6 62:2 62:4 93:7 95:22 95:24 102:3,4 198:15 213:18 215:9 216:7,11 220:21 221:8,13 statutes 51:1,4,5 63:23 70:4 82:17 statutorily 93:12 statutory 89:2 stay 49:14,15 291:3 291:9 stayed 149:10,16,19 149:21,23 251:7 290:16 291:7 Stein 85:17 Stein's 182:2 Steinmetz 172:10 172:12 176:11 Steinmetz's 9:13 stenographic 1:10 319:6 step 63:13 98:1,2 107:22 110:6,7 200:5 224:7 282:15,17,17 300:2 305:15 309:5,10,19 stewardship 207:23 stick 98:6 stipulation 139:22 Stokes 1:23 stood 8:23 stop 13:7,10 31:22 54:8,8 117:17 140:7 161:23 169:2 190:5 203:22 299:15 stopped 169:4 stopping 309:2 storage 193:21	207:16,17 story 105:14 145:22 171:1 251:7 259:15 straight 270:13 straightforward 250:18 stranger 36:1 strategy 53:23 72:22 289:15 street 1:11 2:3,9,20 257:13 Streets 2:15 strenuously 214:10 strikes 80:23 226:1 229:17 strongly 284:3 struggling 194:9 studies 312:18 study 127:19 169:10 186:8,10 stuff 11:20 23:3 39:16 81:11 125:25 129:15,18 175:25 187:15 242:1 283:21,23 287:1 301:24 302:1 stunned 170:25 subject 20:15 23:10 28:9,16 30:9 62:20 194:21 201:11 239:13 241:2 242:4 subjected 109:13 submission 177:3 178:4,6 183:8 197:16 212:18 222:22 226:9 260:8 264:21 274:15,17 submissions 157:11 198:16 227:14 276:22 submit 87:12 92:13 97:16 111:8 153:9 153:15,16,17 165:21 197:2 200:4 206:5 217:18 234:10 264:2 274:10 281:10 298:1 301:21,22 305:10 submitted 85:22 87:7,11 88:19	143:4,5 186:22 200:18 274:20 314:12 submitting 88:17 274:14 subpoena 18:14,20 215:17 216:7 substance 28:20 32:7 80:4,5 87:14 141:7 substantially 282:25 substantive 54:2 57:17 66:17 69:24 69:25 73:6,9,13 73:24 92:13,14,22 287:18 316:19 subterfuge 88:15 success 29:25 175:18 successful 58:6 successfully 260:3 successor 254:13 sudden 55:19 141:19 sued 68:15,15 170:20 171:9,15 171:16 sues 276:5 suffices 208:11 sufficient 12:8 69:9 222:19 224:3 suggest 7:13 34:6 53:2,3 77:14 90:8 217:7 236:3,24 255:5 273:25 suggested 209:3 284:16 suggesting 15:14 suggestion 163:9 218:23 273:8 suggestions 53:4 suggests 54:5 91:3 236:18 258:19 suit 69:1 Suite 1:15,23 2:3 Sullivan 191:8 193:20,24 summarily 91:15 summarized 25:1 summary 112:3 148:15,16,20 151:10,11,13 158:22 159:2 161:17 162:6,16	165:5 167:5 174:13 290:8 sun 78:13 Sunshine 216:14 219:2 222:12 super-dense 250:25 Superbowl 4:2 Superior 91:16 103:25 105:3 supervisory 291:4 supplement 6:19,23 7:14 13:23 14:5 14:24 17:11 18:3 169:15 269:24 supplemental 7:25 8:2 supplementation 15:18 16:12 supplemented 15:2 17:12 supplementing 16:8 supply 152:17 support 44:2 84:24 110:10 190:17 252:21 257:2 311:18 312:7 supported 271:4 280:5,6 Suppose 300:13 supposed 104:12 105:5 185:21 211:21 212:9 219:8 256:10 262:15 268:8 supposedly 117:19 266:8 supposing 300:9 supposition 260:12 suppress 7:9 suppressed 7:18 Supreme 82:25 91:8 91:22 104:1,10 182:7 199:25 215:5 216:10 220:3 293:14 sur-reply 91:2 229:7 231:23,25 234:7,11,15 237:7 304:2 314:10,21 sure 18:10 30:3 34:3 37:19,24 42:24 43:18 66:22 76:24 94:21 99:18 100:1 107:11 115:16 120:8 127:6,9
--	---	---	---	---

134:25 136:9	146:7,8 147:11	311:3 316:7	237:2 242:2	123:1 143:23
149:6 151:7	167:3 202:11	talked 31:18,22	253:14 267:3	144:2,5,16,18
164:17 172:7	204:7,15,24 211:6	38:16 93:9 126:9	268:19 274:24	145:17 148:5
190:2 194:18	212:6 213:12	186:24 207:12	280:8 281:14	152:25 172:22
196:6,8,10 203:24	220:18 224:25	311:21	284:25 293:17	173:6 174:7
209:13 213:14	231:2 259:24	talking 15:25 23:22	304:16 310:11,15	175:11,13 199:2
216:5 220:19	287:19,23 288:16	68:8 73:24 81:1	311:14 314:24	265:8 277:12
231:14 235:7,9	293:3 294:12	103:13 129:6,6	315:14	278:6 297:23
267:2 283:1	304:25 305:4	141:2 189:2	telling 21:10 30:5,6	298:9 299:3
287:14 291:6	taken 1:11 8:17	191:13 193:3	36:4 71:8 115:12	testing 10:15 121:1
310:1 317:23	9:19 38:15 74:21	194:2 220:11	116:10 120:14	123:19 126:22
surface 152:11	96:2 98:2 130:22	226:8 227:3 228:9	141:5 181:19	129:20,22 132:6,7
surfaced 156:25	130:25 154:23	235:4 241:23	241:12 278:14	136:24 138:2,15
surfaces 139:25	156:19 159:21	247:5 249:12	288:16 315:2	146:5,13 167:11
surprised 112:12	192:2,4 194:2	273:5 277:14	tells 33:8 39:8 59:4	168:14,17 176:11
surrounded 184:16	262:1 297:18	278:9 279:16	60:19 250:16	176:18,19 177:24
survives 111:23	298:21 311:24,25	282:7 299:24	269:18	179:2 263:17
suspect 84:15 89:19	319:7	302:9,10 312:10	tempted 88:22	265:11 269:3,4
92:9 108:12	takes 147:23 216:23	316:13	tend 286:1	271:4 272:3,8,9
195:20 198:13	224:7 315:16	talks 83:20 93:22	tender 206:5	273:2 276:18
sustain 197:11	talc 7:3 53:21 89:8	146:2 187:24	term 97:9 102:9	278:25,25 279:12
223:3 250:23	90:17 110:24	189:22,23 191:3	141:6 214:18	279:13 294:22
Swanson 128:22	115:13 116:11,17	196:18	270:2 303:6	295:23 296:18
129:5 130:10	116:18,19 117:4	tangent 101:25	terms 20:7 29:7	297:5
swear 195:7	120:18 123:23	target 185:20	103:5 104:4	tests 123:7 125:23
swearing 176:21	124:6,7 126:1	task 265:1	113:10 122:21	132:12,15 135:23
181:14	127:11 129:4,7,9	TATE 1:22,22	140:2 160:16	136:25 144:24
sweet 288:11	129:10,14,21	Tech 11:1 122:6	179:21 207:13	151:22,24 152:2,3
swore 166:21,25	133:5,10,12 134:1	127:8,9 128:11	217:19 233:22	175:6,6 198:19,21
191:20 193:10	135:24 148:4,17	technical 117:1	274:23 280:1,22	264:23 265:9
199:3	151:5 156:21	118:2,3,5 119:7	283:25 284:1	268:22 270:17,17
sworn 78:5 144:2	158:18 160:6,7	119:10,15,21	terribly 103:18	271:18,18 272:11
147:25 175:11	178:1 198:20	204:22 266:5,7	313:12	276:14,16 289:21
297:23 298:9	199:5,11,12,15	267:1,5,22 268:6	test 83:1 86:22	295:13
299:17	244:9,12 248:8	268:12 269:16	127:6 135:24	Texas 122:6
syncs 57:10	249:5 256:19	271:1,6 289:17	222:24 271:25	thank 7:22 13:13
system 39:7	257:10 258:12	290:3	272:2 273:24	16:20 18:24 34:10
	268:18 270:24,24	technicals 303:7	275:21,24 293:24	39:14 41:19,20
	272:19 273:11	Tee 246:22	295:25,25 296:3	48:4 71:5,25 72:4
T	275:13 276:11,19	TELEPHONIC 3:1	297:21	74:19 77:5 78:23
t 3:4 235:2	276:20 277:7	tell 10:6 21:20 23:3	tested 279:5	78:24 81:21,24,25
Tab 118:2,3,4	278:23 279:2,5,7	48:25 56:11 59:5	testified 122:1	92:3 99:2 107:12
266:17 267:2	289:8 290:9,9	59:24 64:1,4	130:19 132:21	128:7 151:8 161:8
269:5,5 270:18	294:3 295:7 297:9	94:12 100:22	145:1 148:5	206:9 211:14
273:18,20	297:20 300:11	103:16 105:13	156:21 172:12,25	212:16 235:13,24
table 61:13 62:11	talk 9:10 11:15	106:1 113:7	173:3,9 198:23	262:2,9 280:14,18
226:16	31:13,14,16 41:22	115:21 118:8	256:5	301:3 305:17,18
tactics 53:23	44:18 50:2 65:10	119:9 121:25	testifies 135:22	306:1,2 314:19,20
take 25:4 33:17	87:23 102:19	123:15 127:18	142:11	315:22 318:20
40:18,22 55:3	103:10 114:25	137:22 149:6,8	testify 138:15	theirs 61:3
59:16,25 64:10	140:1 185:14	197:14 200:21	156:15,23 175:7	theory 250:22,23
68:11 77:15 82:3	188:17 189:6	203:20 207:4,25	297:8,12	263:1,2
87:23 89:11 96:7	233:13 235:22	208:1 214:9	testifying 137:7	thereof 44:2
112:10,10,11	237:1 242:8 253:9	226:11 232:12	testimony 7:8 32:8	thesauruses 222:10
117:24 118:19,21	272:23 289:6,17	234:12 236:16	43:15 110:25	thin 259:11
118:22 134:9				

thing 93:18,20 97:3 98:15 114:20 121:15,15 135:1 139:15 150:13 157:1 163:24 177:5 186:1 215:15 216:12 222:11 223:7 235:14 249:17 259:12 261:20 265:25 272:16 292:9 299:16 316:25 things 9:8 12:20 26:17 32:17 38:11 39:6 43:21 52:4 56:15 78:14 81:5 102:24 111:8 122:2 124:14 142:17,20 143:13 156:14 174:1 182:5 184:10 192:15 197:2 206:22 226:7 229:12 239:21 241:24 249:13 269:7 274:22 275:21,22 277:5 281:20 286:16 293:18 306:3 think 8:4 14:21,22 15:3 16:2,8 18:18 22:8 24:20 25:2 25:12 29:4,11,24 30:19 31:8 32:23 33:3,22 34:20 36:20 37:25 38:5 38:6 39:15 40:2,4 40:5,6,16,21,25 41:8,14 55:5,6,15 57:12 58:19,19 60:12 61:8 63:9 65:3,13 66:10 68:18 69:5 70:20 70:25 71:10,16 73:22 74:3 76:20 77:11 78:13,21 80:15 81:1,11 98:14 100:6,15 101:4,9 103:24 106:9 107:5 108:20 109:13 110:14 112:1 113:7,9 115:2 118:19 119:19	135:3 144:12 149:15 153:15 154:24 156:4 158:1,2,8 161:5 176:25 179:15 180:7 181:18 186:21 187:5,6 188:1,8 195:3 196:1,12,13 197:15,18,19,21 199:22 201:6,11 201:21 202:5 204:15,19 206:2 207:2,13,22 208:8 208:23 209:1,11 209:17,18,24 210:6 213:4,10 214:6,24 218:2 219:3,21 220:4,23 221:4 222:6,7,10 222:15 224:11,11 224:15 225:3,16 226:6,9,15 227:5 227:12 228:8,18 228:22,25,25 229:12 230:7,11 230:14,19 231:14 231:15 233:21 237:24 238:17 239:15 241:7 242:14 245:2,11 247:4,7,9,15,16 248:13 251:1,2 253:12,22 254:15 255:3,7,25 260:12 260:14 261:6,11 261:16,19 262:23 263:1,4,7 264:13 265:10,16 267:14 268:1,6 269:10 272:20 274:11 276:2,23 278:21 281:6,8,25 282:18 283:15,22,24 284:6,11 285:7,18 285:19 286:13 288:23,24 291:8 292:6 296:10 303:5 304:4,12 306:21 307:9 308:11,16 309:4 309:14,25 313:4,9 313:19,22 314:4 315:18 316:6,25 317:4,12,14	318:16 thinking 16:19 127:20 179:18,21 261:8 thinks 6:4,6 272:14 272:18 283:20 third 7:1,6 18:20 20:21 36:3 45:17 45:24 55:12 58:23 67:20 68:2,3,12 68:21 74:20,25 75:7 77:9,16 84:25 93:4 103:22 118:5 215:14,17 221:4 229:24 248:16 268:20 269:17 270:18 295:3,10,11 311:17 312:5 Thomas 3:8 Thorn 2:21 5:10 thorough 10:16 thought 10:5 16:15 24:15 25:11 116:1 124:25 132:12 136:4,18 145:9 149:10 161:18 163:1 170:5 218:3 257:10,14 262:5 263:12 306:10 thousand 228:7 thousands 9:25 143:6 threaten 258:14 threatened 147:6 three 19:4 88:19 89:24 123:21 125:24 126:6 132:11 133:10 134:12,15 137:7 147:22 165:5 167:11,21 168:2 177:21 180:15 196:22 200:21 202:3,4 206:11 214:14 216:22 234:14,17 235:10 297:7 311:9 three-part 83:1 thresholds 79:6 threw 293:24 throw 41:4 208:17 304:22 throwing 178:16 thrown 264:19	tie 95:8 174:19 tiered 282:13 ties 56:23 time 7:16 9:6 11:7 14:18 17:16,24 18:1 21:14 23:4,4 24:12,19 30:14 33:16,18 36:16 55:3 57:7 58:7,22 60:4 62:22,24,24 62:24,24 66:1,23 69:9 71:17 76:17 94:17 95:7 97:21 97:23 98:11,12 101:10 106:6 111:24 113:24 114:1 116:9 120:2 125:25 127:21 135:14,18,19 139:8 140:12 142:8,15 152:10 154:22 157:6 159:18 163:17 167:15 174:10 175:24 179:3 185:2,25 186:2,9 186:12 187:9,17 189:2,3,15 191:2 196:14 198:6,7 209:22 214:13 216:3,19 219:18 241:10 246:15 247:4,9,22 248:14 249:20 251:5 254:17 258:16 260:23 261:18 262:25 265:22 267:15 268:16 280:13 281:16 284:21 286:3 287:23 288:15,16 291:8,15 292:16 293:22 300:24 301:6,8 305:17 307:10 314:24 319:7 timelines 280:24 timely 67:15 81:20 times 153:8 209:8 228:7 270:19 timing 158:4 219:17 235:6 tip 103:15 tired 6:14 title 47:20 83:20	87:1 161:24 162:8 162:10 163:13 titled 161:17 today 17:21 38:23 78:11 80:16 81:14 81:16 111:15 164:4 167:10 184:25 185:10 186:22 187:7 197:8,9,15 198:17 206:17 209:8 211:18 212:19 214:7 219:10 222:15,17 226:10 230:17 232:4 239:8 250:20 253:13 259:16 269:4 276:18 283:19 286:3 299:25 305:13 306:17 307:20 316:24 318:15 today's 259:7 told 17:2 26:5,10 33:15 50:15 54:19 54:20 55:20 60:8 97:20 111:5 116:15,21,24 129:15 130:13 140:5 149:9 152:13 153:5 160:6,8 164:4 165:8 175:12 182:1 198:24 199:11 203:21 206:25 209:22 258:10 260:16 268:15 271:2 275:5,11 288:19 291:25 294:18 299:15 301:19 302:25 304:13 315:5 317:19 Tom 5:19 Tompkins 69:23 tongue 153:11 top 81:1 215:6 topic 17:14 31:10 tort 67:15 68:5 75:25 Tortfeasor 43:23 47:7 70:2 Tortfeasors 51:2 Tortorella 3:9 5:21 torts 43:25
--	---	--	---	---

total 133:24	263:5 264:8	29:15 315:20,21	26:7,12 27:4	15:2
totality 94:17 95:21	273:25 278:13,15	Tunis 3:7 5:17,18	32:12,15 112:20	untethered 39:7
97:11 199:16	trigger 62:7 153:21	turn 19:5 138:20,22	232:18 233:17	untrue 85:6 163:10
200:1,3	179:5 242:24	138:22 204:12	250:16	206:25
totally 280:22	255:15	205:6 206:10	underneath 166:14	unusual 137:16,17
touch 306:11	triggered 71:14	210:13 211:7,10	underscore 264:18	137:18,19,24
touched 192:25	triggers 61:24 62:1	215:16 231:3	286:5	138:6
touchstone 59:14	Triglia 9:10 137:1	273:12 299:3,5	underscores 262:24	use 69:22 79:17
town 155:24	299:4	turned 137:14,20	understand 14:2	89:25 93:12 125:8
trace 116:18 117:3	Trivial 78:5	138:1,1 139:19	16:9,24 30:3 36:6	127:9 147:19
120:11 121:4,22	trouble 64:5 80:6	157:22 229:16	36:9 41:17 52:19	204:23 221:8,18
122:18,19,21,22	265:25 312:6	311:8	69:3 74:9 76:12	222:13 225:16
123:1,6 126:2	troubled 35:20	turns 98:12 130:17	76:19 77:2 94:19	270:23 308:2,6,9
132:23,24 133:2,3	troublesome 304:15	270:23 284:20	95:13 103:19	uses 278:3
133:21 135:23	304:17	Twain's 17:22	105:8 141:8,24	usual 139:14
136:24 144:25	trucks 278:22	twice 8:24	144:11 153:22	uttered 97:22
198:25 268:13	true 54:9 68:6,24	two 2:3,15 8:14 9:2	154:20 164:16	
273:8,11 274:21	76:15 96:10,18	10:22 14:6,23	180:19 182:3,16	V
276:15 277:6	98:11 123:18	26:1 32:17 41:21	182:19 183:4	vacate 148:20
tracks 156:7	125:15 127:2	41:21 51:1 65:14	185:23 188:15	vacuum 104:7
trample 293:14	142:4,5,6,24	70:4 72:25 79:6	195:15 200:14	112:17
transcript 1:10 6:24	145:14 148:6	82:1,14 83:13	202:22 210:15	Van 274:20 275:6
7:15 8:20,21,23	151:23 152:8,11	88:12,19 89:23	227:4,4 230:9	276:21
9:15,16 11:16,18	183:9 199:20	95:8 97:5 105:16	232:8 269:24	vanilla 208:15
13:4 15:6 16:2	247:25 249:9	107:22 110:7	287:24 290:17	various 259:25
19:9,24 28:6	255:25 260:20	112:25 124:6	296:16 301:11	vastly 65:23
128:10 132:15	278:19 280:13	125:24 133:9,19	304:3,9 305:5,9	venerable 100:25
144:10 190:14	292:6 297:14	133:20 143:9	understanding 8:1	101:13,17 193:3
319:6	303:1 308:8 319:6	168:13 175:6	215:12 265:11	Venn 128:14
transcripts 9:9	truncated 28:3	182:5 193:5	understands 38:9	venued 73:4
transfer 290:22	trusted 284:1	197:17 198:10	41:12	verbatim 163:12
transition 291:11	truth 95:3,6,9 96:24	200:22 206:11	understood 50:23	verdict 50:18 67:25
transmission 289:22	97:5,14 100:15,18	214:2 222:9	56:14 76:6 208:22	verified 198:21,22
294:3	219:11	233:18 235:18	Unh-unh 55:22	294:2
transom 304:23	truthful 144:22	239:10,21 258:16	uninformed 237:2	verifies 137:1
transpire 236:21	145:18	258:18,20 259:9	unique 221:8	173:25
transpired 158:24	truthfully 256:5	260:6 267:7	United 1:1 150:17	verify 167:18
traveled 10:17	try 23:4 34:17 41:18	302:11 303:3	155:15 272:14,18	Vermont 142:24
treating 96:5 216:11	51:16 55:12 58:5	306:2 311:5,6	universe 183:1	version 224:16
tree 310:9,9,10,10	60:5 103:8 111:17	312:9	211:2 221:18	versus 44:3,3 46:20
trees 310:4,7,9	140:9 161:12	two-step 84:4	240:1 243:10	48:16 49:7,11,15
tremolite 120:19	241:2 247:1	type 121:13 271:7	291:19	49:16 50:2,4 51:1
Trenton 133:6	288:13 313:8	typically 107:21	unnecessary 285:20	51:8 53:8 58:16
trial 42:15 43:10,25	trying 9:22 41:13		unquote 20:8 21:8	60:3 67:4,12
44:9 46:1 47:6	53:16 90:21 153:3	U	43:12,16 44:9	69:23 86:16
58:4 59:11,24	169:13 185:13,16	ultimate 108:11	82:23 86:23 88:4	162:18 186:13
60:2,7,11,12,25	192:10 198:2,2,5	ultimately 72:17	89:10 91:4 123:10	235:10 313:18
65:21 66:2,7 67:2	208:9 244:22	104:23 301:12	unrebutted 207:1	vest 71:11
67:3 68:11 69:10	250:7 251:6,15	uncertain 72:19,20	unreliable 124:2	videotape 132:1,18
69:11,18 70:6,18	262:25 264:5,17	unclear 292:23	132:10 144:24	view 14:7 25:23
72:19,21 79:4	265:17 273:7	293:2,9	175:15 271:18	29:13 31:3 34:25
83:9 86:21 111:23	279:23 280:23	uncover 207:15	272:2,12,14,18	89:11 101:3
260:2 295:6	298:3,5 305:22	uncovered 206:17	294:13	197:20 223:5
trials 51:12	307:15 309:4	undercut 264:5	unsettleable 61:6	225:15 233:18
tried 121:25 154:3	Tuesday 28:12	underlying 20:15	unsupplemented	260:16,17 261:16

282:10 308:15 viewed 101:17 Village 1:23 Villanova 203:11 Vince 5:4 VINCENT 2:23 violate 293:14 violated 302:7 violates 61:23 violating 184:2 violation 92:11 198:14 200:8 298:17 virtually 147:4 153:5 313:20 vitiate 79:21 vitiated 260:23 voicemail 39:5,8 volunteer 47:25 vs 1:5	182:2,9,10 184:1 184:9 187:8 190:2 190:4 192:7 197:21,23 200:12 201:15 202:11,12 202:14 204:3 207:21 212:8,19 221:24 222:14 230:23 233:23,25 235:9,25 236:15 237:22 238:9,23 239:5,10,25 240:1 245:12 259:24 261:15,17,18 267:1,12 273:20 276:4 280:15 281:14 283:24 284:4,23 285:6,19 286:4,14 287:5,7 288:3 289:8 293:14 304:5,8,17 304:20,20 314:24 314:25 315:4,24 wanted 10:19 33:21 72:25 99:17 127:5 145:8 178:5 183:7 187:3 209:24 210:7 229:14 237:12 262:13,21 264:15 265:4,15 266:3 267:19 268:2 271:12 272:6,23 275:8 306:11,14 wanting 17:20 wants 57:5 90:25 91:24 115:25 249:14 warrant 85:10 Warren 3:7 warts 254:11 Washington 2:10 wasn't 54:23 56:1 64:13 125:22 131:5,8 138:21 139:7 145:14 160:10 165:1 171:2 184:12 246:3 249:3 268:25 269:1 295:7,8 296:6 306:4,7 311:7 waste 120:16 138:14 284:21 wasted 33:16,17	watch 140:4 watching 281:6 waving 290:1 way 22:8 29:7,22 40:17 41:3 54:14 56:16 63:23 64:12 64:12 66:16 70:12 74:13 79:23 82:14 100:21 102:18 108:8 114:21 116:5 125:18 141:3,25 144:23 144:25 168:22 177:9 185:16,17 188:20 196:5 220:8 227:19 244:16 245:7 248:3,4 260:16,17 261:7 268:4 289:18 291:6 292:1,2,12 294:4 301:16 302:21,21 304:24 307:14 ways 26:2 101:13 260:10 we'll 11:7,14 16:19 36:17 74:12,23 81:19 112:3 116:12 126:11 140:1 141:25 142:5 152:17 155:25 204:24 205:3 206:22 209:19 231:7 234:6 259:6 281:11 286:21 300:4,8 305:5,15 315:23 317:1 we're 13:25 15:17 17:14 20:10 35:4 39:7 40:6,9 41:8 41:13,14 44:18 48:5,5,6,15 52:17 55:20,23 57:15 60:2 61:13,14,14 64:16 69:18 70:21 70:21 72:15,17 73:24 76:13 78:3 78:9,13,16,21 79:23 81:1 82:1 92:12,15 98:14 99:4,12,18 101:9 102:17 103:20,21 114:25 118:16 122:16 136:9,20	147:17 149:24 150:8 177:20 181:6 182:4 189:2 202:9 204:1,22 211:21 223:24 226:8 227:3 228:9 230:19 234:1 235:4,9 236:19 242:2 247:4 250:14 262:6 279:11,12,13,16 280:20 282:23 283:24 292:24 298:2,3,5 299:24 300:20 308:16 309:4 310:13 312:10 315:18 316:19,21 317:15 we've 9:21,23 30:15 33:3,22 38:16 40:4 65:11 79:25 81:25 109:22 110:21 151:22 153:5 154:3 163:20 181:23 182:1 188:21 189:19 198:17 200:2,5 214:12 232:4,14,16 233:21 234:2 239:3 262:24 264:17 273:16 286:2 292:1 300:21 306:12,15 306:21 309:17 312:5 316:16 Wednesday 203:9 203:10 236:5 301:2,5 314:13 weekend 22:25 284:14 306:3,6 weekends 25:10 299:19 weeks 15:21 234:14 234:18 235:10,18 312:9 weigh 58:1 weighs 118:20 weight 12:12 13:6 16:5 88:24 168:10 Weiner 150:15 151:4 welcome 4:2 118:18 310:20 Wengerd 19:9,12,23	20:6,20 22:19,22 23:18 30:8 38:12 39:2 Wengerd's 21:13 25:3 33:17 went 10:21 11:1,20 41:1 48:13 54:18 55:21 101:25 105:4 127:2,8 132:5,7,13,15,16 138:9,12 142:11 153:2 155:12 156:16 161:12 164:13 169:16 171:21 172:9,15 176:10 184:10 186:2 190:6 196:22 207:19 231:19 256:11 258:14 295:3,10 302:17 318:8 weren't 125:10 164:21 165:1 249:4 278:10 295:8 Westfall 9:2 11:17 11:20 123:22 135:11 137:8,11 138:10,19 139:20 143:24 144:1,2,10 144:17 155:23 156:10,11 157:3,5 162:18 165:14,17 165:19 169:8 188:19,23,24 189:23 191:4,14 191:16,19 193:22 247:22 251:11 256:1,2,9,17,20 257:9,16,21 261:5 261:6,8 292:15 wet 300:4 whatever's 300:23 whatsoever 267:22 Whittaker 162:18 whoa 122:7 257:3,3 Whoops 256:11 wife 17:19 101:10 131:13,22 147:9 147:10,20 wife's 131:17 WILLIAM 1:17 Williams 1:3 20:14 24:25 25:16 28:12 28:24 29:16 31:19
---	---	---	---	--

32:11 33:15 win 103:21 wind 60:2 wise 65:5 197:18 308:19 316:10 wit 250:4 withdraw 24:2 229:2,18 231:22 withdrawing 304:1 withdrawn 148:18 withheld 15:15 47:16 107:19 122:21 175:22 181:9 183:14 184:17 197:1 202:4 301:15 withhold 113:12,13 179:16 298:10 withholding 178:1 179:1 297:20 witness 32:2 36:22 36:23,25 96:4,7,8 122:5 witnesses 34:1 151:15 169:17 171:19 256:5 won 297:17 wonder 157:16 wondering 98:17 Woodland 1:15 word 61:24 72:3,5,6 218:21 244:23 278:3 286:5 words 23:7 84:7 93:13 97:7 112:25 134:23 163:13 187:8 204:12 221:8,14,16 274:21 286:6 work 22:8 29:25 38:11,24,25 39:16 41:3 70:12 84:18 89:4 102:18 139:17,19 158:20 160:10 164:15 179:13 216:18 221:24 245:21,25 317:13 worked 32:24 33:22 128:23 152:14 154:24 176:21 working 21:10 169:3 249:5 317:2 works 154:15,19,20 219:13	world 10:2,3 34:20 133:2,4 244:11 worst 285:12 worth 40:16 106:10 247:6 291:23 298:23 worthwhile 99:19 wouldn't 68:22 145:7 284:4,23 285:16 wrap 77:20 writ 255:17 write 17:24 18:1 105:18,19 149:7 281:18 writing 33:18 65:9 105:16 315:25 316:3 written 56:4 165:7 wrong 10:6,7 56:20 94:12 148:8 150:6 176:3 178:10,13 221:11 226:4,7 249:16 285:10 298:16 wrongdoing 258:22 wrongful 213:9 245:4 247:18 249:7,22 254:22 254:24 260:9 wrote 64:6 151:3 199:9,10 www.tate-tate.com 1:25	89:7 101:7,11 112:9 133:10 134:12,15 139:25 147:23 165:5 169:6 194:2,20 196:22 213:25 215:11 216:22 246:15 251:8 255:2 275:19 years' 247:6 291:23 yellow 188:6 yesterday 6:3,12 yield 28:22 yon 60:23 York 2:20 148:8 149:21 Young 44:3 46:20 48:16 49:6,10,15 49:16,22,23 50:2 50:4 51:1,8 53:8 58:16 60:3 68:19 77:21 younger 237:22	51:22 53:17 120 213:25 301:8 12th 19:25 13076 269:13 133 169:21 14 52:2 65:9 14th 20:3 15 8:12 20:22 88:9 198:10 313:16 150 177:10 213:25 15th 209:18 16 6:23 8:24 20:9,23 85:20 87:5 169 185:9 16th 21:3 17 2:20 77:15 87:10 190:9,18,23 171 186:16 1735 1:11 176 209:20 17B 190:19 17th 8:4 10:3 15:11 21:9 18 20:1,6 40:14 41:1 182 209:20 18th 2:15 19 117:16 19103 2:4,16 1960 215:9 218:12 1967 115:10 1970 251:25 1970s 115:8,11 249:4,12 251:21 255:10 263:18 271:21 272:4 275:12 279:6 1972 120:13,19 271:3,25 272:8 275:19,22 1973 115:19,22 120:16 1977 120:17,21 272:9 1978 266:24 1979 10:13,14 83:1 126:5 127:2 170:12,18 186:8 273:2 274:2 275:15,20,24 276:14 278:22 1980s 53:19 115:11 141:19 248:25 1982 135:13 207:19 248:9 1983 6:23 193:15	194:13,16,17 278:6 302:4 1984 130:1 187:22 1988 191:17 193:10 1989 190:9,23 193:10 1992 114:2 19th 3:3
	<hr/> X <hr/>			<hr/> 2 <hr/>
	X 121:14 163:13 x-ray 289:20 XI01040 319:19 XRD 294:4			2 20:16 55:11 103:12,13,13,18 197:24 207:2 220:9,12 224:7 264:7 269:5 270:18 282:17 309:5 312:12 313:13 2/13/79 274:5 2:11-cv-01754-JL... 1:2 20 20:25 21:25 139:25 291:23 200 1:15 20005-5793 2:10 2000s 245:14 263:20 2001 2:3 2004 155:20 2005 191:13,18 193:11,16 194:1 194:19 195:5 2005-2006 165:18 2006 114:17,18 155:20 158:7,8 160:3 165:4 207:20 253:2,3 290:5,14 291:4,17 2008 255:1 2009 114:21 147:5 147:22 159:20 206:17 207:8 245:8 251:21,24 255:2 290:5 2010 207:11 2011 40:23 160:13 160:15 208:2 2012 86:17 278:6 2014 215:17 2017 14:11 19:7,19 19:25 20:9 42:1 49:24 51:10 82:9 263:4 2018 1:8 6:21 7:12 20:10,11,18 21:8

21:13 39:6 42:12 45:2,6 46:14 85:20 87:5,10,18 90:19 91:8,8 319:19 208 86:17 20th 6:21 23:16 21 7:12 20:25 21:13 21:16,23 23:25 190:13,16 210 1:15 21B 190:7 21st 21:6 22:4 29:24 81:8 236:3,4,5 238:2 314:23 22 20:16 24:4 83:23 194:2 22nd 5:16 24:22 25:2 273:2 274:1 316:12 23 1:8 20:25 21:7 28:6 194:19 232 83:1 24 19:20 20:1 40:13 41:1 42:12 45:2 88:6 247 90:19 25 3:6 101:11 209:11 26 319:19 26th 263:4 27 19:7 42:1 28 87:24 28th 203:11 314:13 29 82:25 273:18,20 2900 2:3 2A:84A-20(2) 92:11 2A:84A-20(2)(a) 82:18 2A:84A-20(2)(c) 44:15 2nd 14:11 82:9 87:18 <hr/> 3 <hr/> 3 136:5,19 177:2 220:10 269:5 270:18 273:17,19 3:30 140:8 203:22 30 64:7 89:7 169:6 247:6 251:8 30(b)(6) 154:14 155:5 300,000 133:17 3000 2:15	316 75:15 77:15 316-317 75:11 317 74:24 75:9,14 33 204:17 265:19 268:11 34(b)(2)(C) 47:13 35 88:12 209:11 234:22 304:20 311:8 350 74:24 365 42:1,21 368 19:8 37 83:23 37.1 45:4 47:1 370 82:10 38 101:6 <hr/> 4 <hr/> 4 20:16 136:6,11,11 136:14 215:5 216:9 273:17 4:7-5(c) 46:2 40 271:13 272:7 408 85:21 409 87:5 40s 143:19 410 87:11 414 42:12 415 45:2 42 274:4 424 45:6 425 46:15 426 87:19 43 88:7 430 46:24 434 20:4 437 3:10 44 88:5,20 90:24 157:13 229:10,14 233:7,24 234:19 304:22 442 20:12 443 6:22 444 23:25 445 7:13 45 228:12 272:24 273:1 450 270:19 47 128:5,6 275:4 48 275:6 48th 1:11 49 274:19 4E 273:16 <hr/> 5 <hr/>	5 20:19 24:4 28:6 45:6 46:14 5/17/79 128:1 5:45 318:23 50 173:21 502 32:21,22 502(d) 23:24 504(2)(a) 82:19 50s 143:19 218:14 51 169:17 519 86:17 520 1:23 538 86:23 56 277:25 <hr/> 6 <hr/> 6 91:7 60 234:15,17,20 237:13,14 238:9 238:11,13 282:22 282:24 314:22 600,000 134:16,18 134:19 278:19 279:9 61 88:1 200:20 201:2 210:17,21 211:5 636-8283 1:24 655 2:9 66 245:12 255:1 6th 38:16 <hr/> 7 <hr/> 7 20:16 90:19 117:19 130:1 187:22 7.1(i) 24:7 7/13/2009 196:17 7/22/2005 191:2 7/23/2005 189:22 70 215:11 70s 168:22 245:7,14 247:22 248:11,11 248:22 251:10,10 255:21 75 300:22 79 128:20 171:4 79J-4 274:4 <hr/> 8 <hr/> 8 20:25 90:14 117:19,21,23 118:1 80 2:20 215:11 800 1:24	80s 130:22 131:1 169:5 248:12 263:20 83 135:22 856 1:24 <hr/> 9 <hr/> 9 20:18 21:21 24:4 91:8 117:21,23 118:2,4 266:3 267:2 90s 49:24 263:20 983-8484 1:24 9th 19:18 20:11 22:5	
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